SUBJECT INDEX

Page

IMPORTANCE OF THIS CASE FROM THE STANDPOINT OF THE STATE OF CALIFORNIA 3

I. Section 9a of the California alien land law and section 1983 of the Code of Civil Procedure of the State of California do not deny to any person due process of law nor the equal protection of the laws, nor in any way violate the Constitution of the United States or the Constitution of the State of California 4

A. Statement of, and discussion concerning the "Rule of Convenience," relied on by appellee, and the other and distinct rule, relied on by appellants, requiring a rational connection between the facts proved and the ultimate fact presumed 5

B. Analysis of cases on rule of convenience showing that in many of them it is applied even though they did not involve liquor license or medical or dental licenses 74

C. Analysis of appellants' "Statement of the Points on Which Appellants Rely" 77

II. Analysis of cases cited by appellants to show that no one of them is in point in the matter of the question before this court, the answer to which question is to be determined by the rule of convenience 79

CASES CITED

	Page
Ake vs. State, 32 Am. Rep. 586	57
Atkins vs. The State, 60 Ala. 45	22, 24
Bailey vs. Alabama, 219 U. S. 219	10, 94
Brightman vs. United States, 7 Fed. (2d) 532	81
Casey vs. United States, 276 U. S. 413	12, 73
Clark vs. State, 243 S. W. 865	59
Cleary vs. State, 19 S. W. 313	26
Cockrill vs. California, 268 U. S. 258	30
Commonwealth vs. Bull, 76 Kentucky, 656 (XIII Bush)	52
De Graff vs. State, 103 Pac. 538	16
Ex parte Kreutzer, 204 N. W. 595	65
Ex parte Smith, 218 Pac. 708	86
Faraone vs. United States, 259 Fed. 507	58
Farrall vs. The State, 32 Ala. 557	22
Fleming vs. The People, 27 N. Y. 329	21
Folmar vs. The State, 97 So. 768	58
Fong Ting vs. United States, 149 U. S. 698	9
Freiberg vs. State, 94 Ala. 91; 10 So. 703	22
Gains vs. State, 43 So. 137	51
Hall vs. Johnson, 87 Ore. 21; 169 Pac. 515	85
In re Opinion of Justices, 208 Mass, 619; 94 N. E. 1044	83
King vs. Turner, 5 Maule & S. 206	66
Kreutzer, ex parte, 204 N. W. 595	65
Logan & Bryan vs. Postal Tel. Co., 157 Fed. 570	9
Luria vs. United States, 231 U. S. 9, at 26	10
Hammond vs. State, 84 N. E. 416	92
Manley vs. Georgia, 279 U. S. 1	33
McFarland vs. American Sugar Refining Co., 241 U. S. 79	79
Mobile, etc. R. R. Co. vs. Turnipseed, 219 U. S. 35	9, 13
Morrison and Ozaki vs. The People of the State of California, 288 U. S. 591; 53 Sup. Ct. Rep. 401	96
O'Neall vs. United States, 19 Fed. (2d) 322	82
People vs. Boo Doo Hong, 122 Cal. 606	45
People vs. Brady, 40 Cal. 198	29
People vs. Cannon, 139 N. Y. 32; 34 N. E. 759	91
People vs. Cuff, 122 Cal. 589	88
People vs. Frey, 165 Cal. 140	29
People vs. Hollenbeck, 153 N. E. 691	64
People vs. Lyon, 26 Hun. 180	90
People vs. Mallon, 222 N. Y. 456	9, 28
People vs. Morrison and Ozaki, 125 Cal. App. 282	29
People vs. Nakamura, 125 Cal. App. 268	29
People vs. Nyce, 13 Hun. 298	68

CASES CITED—Continued

	Page
People vs. Osaki, 209 Cal. 169	28, 32
People vs. Quarez, 196 Cal. 404	29
People vs. Toynbee, 20 Barb. 168	89
People vs. Velasquez, 70 Cal. App. 362	37
People vs. Volcano Canyon Toll Road Co., 100 Cal. 87	67
Roberts vs. State, 234 S. W. 89	63
Simpkins vs. State, 249 Pac. 168	87
Smith vs. Commonwealth, 244 S. W. 407	61
State vs. Abbey, 67 Am. Dec. 754	47
State vs. Arnold, 35 N. C. 184	69
State vs. Beswick, 13 R. I. 211; 43 Am. Rep. 26	88
State vs. Carlisle, 139 N. W. 127	56
State vs. Casto, 132 S. W. 1115	57
State vs. Clark, 178 N. W. 419	68
State vs. Divine, 98 N. C. 778; 4 S. E. 477	83
State vs. Evans, 50 N. C. 250	22
State vs. Grimmett, 33 Idaho 203; 193 Pac. 380	85
State vs. Herman Krasne, etc., 170 N. W. 494	48
State vs. Keggon, 55 N. H. 19	68
State vs. Lapointe, 123 Atl. 692	81
State vs. Lipscomb, 52 Mo. 32	68
State vs. McCaffrey, 37 Atl. 234	49
State vs. McGlynn, 34 N. H. 422	24
State vs. Miller, 81 S. W. 867	18
State vs. Momberg, 103 N. W. 566	92
State vs. Potello, 119 Pac. 1023	93
State vs. Rosasco, 205 Pac. 290	15
State vs. Whittier, 21 Maine 341; 38 Am. Dec. 272	67
State vs. Wilson, 1 Atl. 415	89
State vs. Wilson, 64 Pac. 23	53
State vs. Zehnder, 168 S. W. 666	56
Terrace vs. Thompson, 263 U. S. 197	31
United States vs. Hayward, 26 Fed. Cases, 240	48
United States vs. Turner, 266 Fed. 248	60
United States vs. Tria, 17 Philippines, 303	25, 49
West Virginia Coal Co. vs. Charles, 254 Fed. 379	9
Western & Atlantic R. R. Co. vs. Henderson, 279 U. S. 639	33
Williams vs. People, 11 N. E. 881	53
Wynehamer vs. People, 13 N. Y. 387	90
Yee Hem vs. United States, 268 U. S. 178	13, 29

STATUTES CITED

	Page
Alien Land Act of California, section 9a	5
California Alien Land Act, section 9a	6, 30
California Code of Civil Procedure, section 1983	7
Code of Civil Procedure of State of California, section 1983	32
Statutes of California, 1927, page 434, Chap. [illegible]	7
Statutes of California, 1927, page 880, Chap. 528	5
United States Statutes, Vol. 38, page 275	13
United States Statutes, Vol. 35, page 614	13

AUTHORITIES CITED

California Law Review, Vol. 17, page 575	47
Corpus Juris, page 530, section 998	51
Greenleaf on Evidence, Vol. 1, Sec. 79	45, 53, 69
Hughes on Federal Practice, Vol. V, section 3241, p. 331; section 3242, page 331	78, 79
Jones on Evidence, 2d Ed., section 181	70
Ruling Case Law, Vol. 5, page 599, section 23	30

"It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the government. 4 Wigmore, Evidence, Sect. 2486."

From opinion of Mr. Justice Holmes, in case of *Casey* vs. *United States,* 276 U. S. 413, at page 418.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1933

No. 487

GEORGE MORRISON and H. DOI,
Appellants,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

Appeal from the Supreme Court of the State of California

BRIEF OF APPELLEE

Importance of this Case from the Standpoint of the State of California

Unless the State finally prevails in this case, several years of successful litigation concerning the State's Alien Land Act will prove of no avail.

From the *nisi prius* courts of California, to the State's highest court, our act has been construed and sustained.

In the United States Federal Courts, and in the United States Supreme Court, we have successfully met attacks on the constitutionality of this legislation which is so vital to the welfare of our people.

But of what avail is all this if now, the State, after doing all in its power to apply by statute the common sense rule of convenience which we here urge in the matter of proof, finds itself faced with an insurmountable barrier?

That barrier is the utter impossibility to prove the nativity or race of a defendant, and the further impossibility to prove non-naturalization. And it is a simple matter for the defendant himself, who has peculiar knowledge of the facts, to prove his nativity, his race, and his naturalization as a United States citizen if in fact he has been naturalized.

I

SECTION 9a OF THE CALIFORNIA ALIEN LAND LAW AND SECTION 1983 OF THE CODE OF CIVIL PROCEDURE OF THE STATE OF CALIFORNIA DO NOT DENY TO ANY PERSON DUE PROCESS OF LAW NOR THE EQUAL PROTECTION OF THE LAWS, NOR IN ANY WAY VIOLATE THE CONSTITUTION OF THE UNITED STATES OR THE CONSTITUTION OF THE STATE OF CALIFORNIA.

(See Statutes of California, 1927, pages 880 and 434.)

A. Statement of, and Discussion Concerning the "Rule of Convenience," Relied on By Appellee, and the

Other and Distinct Rule, Relied on by Appellants, Requiring a Rational Connection Between the Facts Proved and the Ultimate Fact Presumed.

We shall discuss the above indicated subject matters and then shall proceed to analyze each and every case cited by counsel for Appellants in his brief, to show that no one of them is in point in the matter of the issues before this court.

In urging that the State statutes in question are unconstitutional, appellants assert that by said provisions and by the decision of the State Supreme Court in this case, appellants proceeded against are denied the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

While in this brief we hereinafter refer to section 9a of the California Alien Land Law, we ask that the reference be considered as including section 1983 of the Code of Civil Procedure of the State of California.

That portion of Chapter 528 of the Statutes of California, 1927, which adds section 9a to the California Alien Land Act, reads as follows:

"CHAPTER 528.

An act to amend an act entitled 'An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this State, providing for escheats in certain cases, prescribing the procedure therein, requiring

reports of certain property holders to facilitate the enforcement of this act, prescribing penalties for violation of the provisions hereof, and repealing all acts or parts of acts inconsistent or in conflict herewith,' submitted by the initiative and adopted and approved by the electors of the State of California, November 2, 1920, as amended, by adding two new sections numbered nine and nine b.

(Approved by the Governor May 16, 1927. In effect July 29, 1927.)

The people of the State of California do enact as follows:

SECTION 1. A new section to be known as section 9a is hereby added to the act cited in the title thereof and to read as follows:

Sec. 9a. In any action or proceeding, civil or criminal, by the State of California, or the people thereof, under any of the provisions of this act, when the proof introduced by the state, or the people thereof, establishes the acquisition, possession, enjoyment, use, cultivation, occupation, or transferring of real property or any interest therein, or the having in whole or in part the beneficial use thereof by any defendant, or any of such fact, and the complaint, indictment or information alleges the alienage and ineligibility to United States citizenship of such defendant, the burden of proving citizenship or eligibility to citizenship shall thereupon devolve upon such defendant.'"

Chapter 244 of the same session of the Legislature,

adding section 1983 to the Code of Civil Procedure, reads as follows:

"CHAPTER 244.

An act to add a new section to the Code of Civil Procedure, to be numbered one thousand nine hundred eighty-three, relating to the burden of proof in certain cases.

(Approved by the Governor April 25, 1927. In effect July 29, 1927.)

The people of the State of California do enact as follows:

SECTION 1. A new section is hereby added to the Code of Civil Procedure to be numbered 1983 and to read as follows:

1983. Whenever in any action or proceeding, civil or criminal, brought by, or in the name of, the state or the people thereof, or by or in the name of any political subdivision or agency of the state, or by any public board or officer on behalf of any thereof, to enforce any law which denies any right, privilege or license to any person not a citizen of the United States, or not eligible to become such citizen, or to a person not a citizen or resident of this state, and whenever in any action or proceeding in which the state or any political subdivision or agency thereof, or any public board or officer acting on behalf thereof, is or becomes a party, it is alleged in the pleading therein filed on behalf of the state, the people thereof, political subdivision or agency, or of such board or officer, that such right, privilege or license has been exercised by a person not a citi-

> zen of the United States, or not eligible to become such citizen, or by a person not a citizen or resident of this state, as the case may be, the burden shall be upon the party for or on whose behalf such pleading was filed to establish the fact that such right, privilege or license was exercised by the person alleged to have exercised the same, and upon such fact being so established the burden shall be upon such person, or upon any person, firm or corporation claiming under or through the exercise of such right, privilege or license, to establish the fact that the person alleged to have exercised such right, privilege or license was, at the time of so exercising the same, a citizen of the United States, or eligible to become such citizen, or was a citizen or resident of this state, as the case may require, and was at said time legally entitled to exercise such right, privilege or license."

The above quotation, as also the quotation of the statutes in appellants' brief, is accurate. The quotation found at pages 2-3 of appellants' statement as to jurisdiction has some slight discrepancies. Counsel for appellants and the appellee stipulate as to this.

It is our contention that section 9a of the Alien Land Law merely invokes, in prosecutions had under its provisions, the "rule of convenience" as applied to proof. This so-called rule of convenience is generally defined as follows:

> "When the negative of an issue does not permit direct proof, or where the facts come more

immediately within the knowledge of the defendant, the *onus probandi* rests upon him."

That such a rule is merely a rule of evidence appears from many decisions of the Supreme Court of the United States. One of the leading cases on this subject is *Mobile etc. Railroad Co.* vs. *Turnipseed,* 219 U. S. 35, 5 Law Ed. 78.

See also *West Virginia Coal Company* vs. *Charles,* 254 Fed. 379, and *Logan & Bryan* vs. *Postal Telegraph Co.,* 157 Fed. 570. *People* vs. *Mallon,* 222 N. Y. 456; 119 N. E. 102, and *Fong Ting* vs. *United States,* 149 U. S. 698, 37 L. Ed. 905.

Viewing the provisions of section 9a under the foregoing authorities, it at once appears conclusive that the provisions of this section do not relate to nor affect any vested right. The provisions of this section 9a merely establish rules of evidence and therefore their purpose is only to regulate procedure. There is, of course, no vested right in any of the rules of evidence. Such rules may be changed at any time without destroying any vested right in so far as such rules do not deny to any person the right to be heard and to have his claims or his rights adjudicated.

As said in *Mobile etc. R. R. Co.* vs. *Turnipseed,* 219 U. S. 35, at 43:

"If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to sub-

mit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

This language is quoted favorably by the United States Supreme Court in *Luria* vs. *United States,* 231 U. S. 9, at page 26, and then this court adds after the quotation:

"Of like import are *Fong Yue Ting* vs. *United States,* 149 U. S. 698, 729; *Adams* vs. *New York,* 192 U. S. 585, 599; *Bailey* vs. *Alabama,* 219 U. S. 219, 238; *Lindsley* vs. *Natural Carbonic Gas Co.,* 220 U. S. 61, 81; *Reitler* vs. *Harris,* 223 U. S. 437, 441."

In the above cited case of *Luria* vs. *United States,* 231 U. S. 9, we have a review of a decree setting aside and canceling as fraudulently and illegally procured a certificate of citizenship theretofore issued to Luria. This was under the act of June 29, 1906 (34 Stats. 596, 601). Section 15 of this act made the taking up of a permanent residence in a foreign country shortly after naturalization a presumption rebuttable by proof to the contrary of intention not to reside permanently in the United States. The court held that the creation of this presumption was not a denial of due process of law.

While this is a civil case, and while there was a rational connection between the fact proved and the presumption reached, we refer to language found at

page 25 which we consider to be of interest to us in this discussion:

> "Objection is specially directed to the provision which declares that taking up a permanent residence in a foreign country within five years after the issuance of the certificate shall be considered prima facie evidence of a lack of intention to become a permanent citizen of the United States at the time of the application for citizenship, and that in the absence of countervailing evidence the same shall be sufficient to warrant the cancellation of the certificate as fraudulent. It will be observed that this provision prescribes a rule of evidence, not of substantive right. It goes no farther than to establish a rebuttable presumption which the possessor of the certificate is free to overcome. If, in truth, it was his intention at the time of his application to reside permanently in the United States, and his subsequent residence in a foreign country was prompted by considerations which were consistent with that intention, he is at liberty to show it. *Not only so, but these are matters of which he possesses full, if not special, knowledge.*"
>
> (Italics supplied.)

With reference to the language used by the United States Supreme Court which we have emphasized in the above cases it is significant that the court used that language even though it was considering a statute which does include a provision expressing a rational connection between the fact proved and the fact presumed. The United States Supreme Court,

however, goes on to say that in addition, facts were peculiarly within the knowledge of a party and therefore the rule of convenience should be applied.

This would appear to indicate that the court considered that this was a reason sufficient unto itself for the rule of these different cases.

The presumption in our case is not one of evidentiary or probative effect, nor is it intended to be of that character. It is intended by the State, speaking through the Legislature, to regulate by this presumption the *order* of proof; in other words, the procedure, placing the primary burden upon the State of proving the fact of possession or the fact of the defendants having assumed to take title.

Whereupon, such proof having been made, there devolves upon the defendant the burden of establishing by evidence the fact that he is eligible to United States citizenship, and for that reason the proof of the plaintiff will not support a judgment in its favor against said defendant, in a case where the defendant shall have established his eligibility.

As said by the Supreme Court of the United States, speaking through Mr. Justice Holmes, in *Casey* vs. *United States,* 276 U. S. 413, at page 418:

> "Furthermore, there are presumptions that are not evidence in a proper sense, but simply regulations of the burden of proof. *Greer* vs. *United States,* 245 U. S. 559. The statute here talks of *prima facie* evidence but it means only that the burden shall be upon the party found in posses-

sion to explain and justify it when accused of the crime that the statute creates. 4 Wigmore, Evidence, Sect. 2494. It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the government. 4 Wigmore, Evidence, Sect. 2486."

The rule of convenience was suggested by the United States Supreme Court in a criminal case where, however, the statute did have the elements of a rational connection between the fact proved and the fact presumed. We refer to *Yee Hem* vs. *United States,* decided in 1925 and reported in Volume 268, United States Reports, at page 178. An act of February 9, 1909 (35 Stats. 614), sections 1 and 2, as amended January 17, 1914 (38 Stats. 275), prohibited the importation of smoking opium after April 1, 1909. The act made it an offense to conceal such opium, knowing it to have been imported contrary to the law, and provided that possession by the defendant "shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury."

The court, at page 183, quoted from *Mobile etc. R. R.* vs. *Turnipseed,* 219 U. S. 35, at 42-43, as follows:

" 'The law of evidence is full of presumptions either of fact or law. The former are, of course,

disputable, and the strength of any inference of one fact from proof of another depends upon the generality of the experience upon which it is founded.

* * * * *

Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous. * * *'"

Then, with reference to the rule of convenience, we find the court using this language at page 185:

"The point that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself may be put aside with slight discussion. The statute compels nothing. It does no more than to make possession of the prohibited article *prima facie* evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. *If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case.* The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would

be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the constitution."

We have italicized the above to indicate the court's reference to the rule of convenience.

With reference to the presumption of innocence with which the law clothes every defendant, and its relationship to the rule of convenience, and the shifting of the burden of proof to the defendant, we have a very good discussion by the Supreme Court of Oregon in *State* vs. *Rosasco,* 205 Pac. p. 290, at page 294, col. 2, and page 295, col. 1, as follows:

"The trial court, by its instructions, did not reverse the presumption of innocence with which the law clothes every defendant when upon trial charged with crime. The presumption of innocence is not a mere form, but a substantial part of the law, that remains with the defendant from the beginning of the trial until a verdict is found. The law presumes every defendant upon trial charged with crime to be innocent, and it devolves upon the prosecution to prove by evidence to the satisfaction of the trial jury, beyond a reasonable doubt, that the defendant committed the crime charged in the indictment. The burden of proof is never shifted from the state to the defendant, but remains with the state throughout the trial, to establish every constituent element of the crime as charged. *State* vs. *Huffman,* 16 Or. 15, 24, 16 Pac. 640; *State* vs. *Gibson,* 43 Or. 184, 73

Pac. 333; *State* vs. *Keelen* (Or.), 203 Pac. 310; Bishop's Crim. Proc., 1048 to 1055, inc.; *State* vs. *Duestrow,* 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; *Horn* vs. *State,* 30 Tex. App. 541, 17 S. W. 1094; *Long* vs. *State,* 23 Neb. 33, 36 N. W. 310; *State* vs. *Lowry,* 42 W. Va. 205, 24 S. E. 561. But this does not mean that, when a defendant relies upon an exception for a defense, the state must prove that he is not within the protection of the exception.

'Indeed,' say the editors of R. C. L., 'it is stated as a maxim that the burden of proof never shifts from the prosecution to the defense. This, however, means only that it never shifts in so far as it is necessary to make out the specific crime charged in the indictment, by establishing the *corpus delicti* and the constituent elements of the crime. When distinct, substantive matter is relied upon by the defendant to exempt him from punishment and absolve him from liability, which is foreign to the issue as made by the state in the charge against him, the burden of proving it properly should be upon the defendant.' 8 R. C. L. p. 171."

De Graff vs. *State,* 103 Pac. 538.

This was a case decided by the Criminal Court of Appeals of Oklahoma. The State statute made it unlawful to ship or in any way convey liquors from one place within the State to another place therein "except the conveyance of a lawful purchase as herein authorized."

Counsel for the defendant insisted that the second

count was defective because it failed to negative the exceptions contained in the statute.

In deciding that the burden is upon the defendant to prove that he comes within the provisions of this exception and that the indictment need not negative the exceptions contained in the statute, the court, at pages 547 and 548, said:

> "When an exception is stated in a statute, and the existence of the fact or facts necessary to bring the act charged within the exception are peculiarly within the knowledge of the defendant, the burden is upon the defendant to prove the facts so within his knowledge, and which constitute a defense to the accusation. In other words, the nonexistence of such fact or facts will be presumed in the absence of evidence to the contrary. There is no safer or higher authority on the law of evidence than Mr. Wigmore. His statements of law are clear and accurate, and his citation of authorities, as far as we have had occasion to look them up, are correct and to be relied upon. Referring to the principle above stated, on page 2512, vol. 4, in his work on Evidence he says: 'In sundry other instances, a naturally affirmative defense is sometimes apportioned to the accused burden'."

* * * * *

> "Mr. Black, a standard authority, in his work on Intoxicating Liquors (page 597), announces the same doctrine, as follows: 'Where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by

that party. Such is the case in civil or criminal prosecution for a penalty for doing an act which the statutes do not permit to be done by any person except those who are duly licensed therefor; as, for selling liquor, exercising a trade or profession, or the like. Here the party, if licensed, can immediately show it without the least inconvenience; whereas, if proof of the negative were required, the inconvenience would be very great. Another view advanced by the court in Georgia is that plea of "not guilty" to a charge of selling without license, amounts to an allegation of selling with license, and the rule applies that he who alleges affirmative must prove it, especially if it is peculiarly within his knowledge.'

Now if it is not necessary for the state to prove the nonexistence of such exceptions, why is it necessary to negative them in the information or indictment? That this negative is not necessary is held in the following cases:" (Citing cases.)

In this case there was no statute creating a presumption. As for the phraseology of the statute, it appears that the exceptions are not made a part of the description of the offense. For this, see the language of the court at pages 546 and 547. For significance of the phraseology, see our discussion of the next case, *State* vs. *Miller*.

State vs. *Miller*, 81 S. W. 867.

This case, decided by the Supreme Court of Missouri, determined that a person charged with being an accessory after the fact has the burden of proving

that he comes within the classes of exempted persons defined by the statute. At pages 873 and 874 the court said:

"We are thus brought to the last contention of defendant, and that is that the state did not show that defendant did not stand in the relation of husband or wife, parent or child, grandparent or grandchild, brother or sister, the persons excepted by our statute (section 2365, Rev. St. 1899) from guilt by reason of aiding and assisting an offender after the commission of a crime, with intent to aid him in escaping or avoiding arrest."

* * * * *

"*While it is true this exception of relations in certain degrees appears in the enacting clause of this statute,* and therefore it was necessary for the grand jury to negative such a relationship, yet it is also true that, if such a relation existed, it was an absolute defense whether Woodward was guilty or not, and it is a reasonable presumption in the practical administration of justice that a man is acquainted with his own relatives, or at least knows of his relationship to those within the degrees fixed by the statute, and when, as in this case, the defendant was shown to have sworn he did not know who Grant Woodward was, it would have been a work of supererogation for the state to have gone further in proving the negative. It is true the defendant did not have to prove his innocence; but, if there was any such relationship as would have excused him in aiding Woodward to make his escape, it was peculiarly within his own knowl-

edge, and he has not availed himself of it." (Italics ours.)

* * * * *

"While we think the grand jury was required to negative the relationship of Woodward and defendant, we hold that the knowledge of such a relationship as would, under the statute, excuse defendant for aiding and assisting Woodward escaping arrest, was within the peculiar knowledge of defendant, and could have been established without any inconvenience and upon the authority of our own decisions, as well as those quoted from the common-law authorities, the burden was on him to show the relationship, which would itself have entitled him to an acquittal."

There was no statute creating a presumption.

The statute in this case provided that "every person not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity, who shall be convicted of having concealed any offender after the commission of any felony * * * shall be deemed an accessory after the fact * * *."

Revised Statutes of Missouri, 1899, Sec. 2365.

The court's reference to the necessity of an allegation in the indictment negativing the relationship of Woodward and defendant, has to do with an artificial distinction made in some of the cases. This distinction so made is where an exception provided in a statute, excusing a defendant, is included in the

enacting clause, rather than in a proviso creating the exception. The court holds that the negation of facts excusing defendant should be expressed in the indictment. But at the same time the court expressly applies the rule of convenience, where facts are peculiarly within the knowledge of the defendant, irrespective of the form of the statute.

Fleming vs. *The People,* 27 N. Y. 329.

The statute declared that every person having a wife living, who shall marry any other person, "except in the cases specified in the next section," shall be adjudged guilty of bigamy.

The next section declared that the preceding one should not apply to certain classes of persons. The court held that the burden was on the defendant to show he came within one of the excepted classes—on ground of rule of convenience.

The important thing in this decision is that, so far as the opinion written by Denio, Chief Justice, is concerned, he read that statute as in effect including the exceptions in the enacting clause—and therefore that the indictment was technically defective in not negativing them, but *nevertheless* held that he would apply the rule of convenience—and *in the absence of any statute creating the presumption.*

At page 334 Chief Justice Denio says:

"It is, moreover, a general rule of evidence that where the negative of an issue does not permit direct proof, or where the facts come more

immediately within the knowledge of the defendant, the *onus probandi* rests upon him."

State vs. *Evans,* 50 N. C. 250.

Here we have a case where, *in spite of the fact that the State was required to prove the negative allegations* because of the wording of the statute, the court recognized that there would be an exception in the case where the rule of convenience was applicable.

Freiberg vs. *State,* 94 Ala. 91, 10 So. 703, held that in a prosecution for selling liquor to a minor, the burden is on the defendant to show the consent of the parent or the person having control of the minor, rather than on the prosecution, to show the want of such consent.

The Freiberg decision cites *Farrall* vs. *State,* 32 Ala. 557, and *Atkins* vs. *State,* 60 Ala. 45.

Section 4038 of the code is referred to in the decision of the court, and also an amendatory act wherein the words "or guardian" are omitted, leaving the statute as amended to read "without the consent of the parent or person having the management or control of such minor." Acts 1890-91, page 1209.

It would appear from such phraseology as is quoted by the court that the exception in the statute is made an element descriptive of the offense. Nevertheless the rule of convenience is applied.

Farrall vs. *The State,* 32 Ala. 557 (cited also in *Gains* vs. *State,* in 43 S. 137).

Here defendant was indicted for selling liquor to a minor, "a pupil of a school or academy," "without the consent of the parent or guardian, or the person having charge of such" pupil.

The defendant asked the court to instruct the jury that the burden of proving that the sale by the defendant was without the consent of the parent, guardian or person having charge of the minor was upon the State. The court refused the instruction.

At page 559 the court said:

> "The charge asked by the defendant was properly refused. 'Where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party'; as in a criminal prosecution for a penalty, for doing an act which the statutes do not permit to be done by any person except those who are duly licensed therefor. Here the defendant, if licensed by the consent of the parent, guardian, or person having charge of the pupil, has peculiar knowledge of it, and can show it without the least inconvenience; and the burden of proving the consent is on him, the consent being in the nature of a license to him. 1 Greenleaf on Evidence (8th Ed.), Sec. 79, and note 1."

Evidently there was no statute creating the presumption. The exact phraseology of the statute is not given except as above quoted, but it would appear that the exception is made an element of the

description of the offense, and nevertheless the rule of convenience is applied.

Atkins vs. *The State,* 60 Ala. 45.

Under an indictment for selling spirituous liquors to a person of known intemperate habits, without the requisition of a physician, the onus is on the defendant to show that he had such requisition, and not on the prosecution to show the want of it.

No statute creating the presumption is set forth.

The exact phraseology of the statute violated is not given, but the indictment was for so selling liquor to a person of intemperate habits "not having at the time the requisition of a physician that the same was for medical purposes." If that was the language of the statute, it would appear that the exception ws an element descriptive of the crime, and nevertheless the rule of convenience was applied.

State vs. *McGlynn,* 34 N. H. 422.

Indictment for keeping intoxicating liquor for sale. One section of the State act declared it unlawful to sell or keep for sale intoxicating liquor—provided that nothing in the act shall prohibit (then detailed certain exceptions.)

On the question of burden of proof as to this and as to what indictment must allege, the court held that since the exceptions were stated in provisos rather than in the enacting clause, the exceptions could be omitted from the indictment.

Then, as to the rule of convenience, it was held that the State did not have to prove that defendant was not an agent for the sale of liquor.

The phraseology of the statute is not given exactly but the court, at page 427, says:

> "The statute provides that no person, not being an agent, shall sell," etc.

This should be read in connection with the language found at page 426:

> "In many cases negative averments and allegations being of the essence of the offense, or of the ground of action, must be proved. But where the subject matter of a negative averment relates to the defendant personally, or is peculiarly within his knowledge, the averment will be taken as true unless disproved by him."

The above language may well be read to mean that the court considered this a case where the negative averments were of the essence of the offense—and nevertheless applied the rule of convenience.

United States vs. *Tria,* 17 Philippines, 303.

Prosecution for criminal violation of the election law in that defendant voted without being qualified so to do. The election law described special qualifications for electors.

The prosecution introduced certain evidence to show lack of these qualifications.

At pages 307 and 308 the court said:

"An accused person sometimes owes a duty to himself if not to the state. If he does not perform that duty he may not always expect the state to perform it for him. If he fails to meet the obligation which he owes to himself, when to meet it is the easiest of easy things, he is hardy indeed if he demand and expect that same full and wide consideration which the state voluntarily gives to those who by reasonable effort seek to help themselves. This is particularly so when he not only declines to help himself but actively conceals from the state the very means by which he may assist him.

* * * * *

Where the subject-matter of a negative averment in an indictment, or a fact relied upon by defendant as a justification or excuse, relates to him personally or otherwise lies peculiarly within his knowledge, the general rule is that the burden of proof as to such averment or fact is on him. (*The People* vs. *Boo Doo Hong,* 122 Cal. 606; *Com.* vs. *Thurlow,* 24 Pick. 374; *State* vs. *Wilson,* 62 Kan. 621; *United States* vs. *Chan Toco, supra.*)"

There was no statute creating a presumption.

The form of the statute does not appear, but it would appear that the lack of qualifications must be an element descriptive of the offense.

In the case of *Cleary* vs. *State,* 19 S. W. 313, there was an indictment for performing labor on Sunday, other than "customary household duties of daily

necessity, comfort or charity." The Supreme Court of Arkansas held that the burden was on the defendant to show that he came within the exception, because the facts were peculiarly within his knowledge. Here there was no rational connection between the performing of work on Sunday or any other day of the week, and the presumption that the work so performed was unnecessary work.

There are some instances where this burden of proving facts peculiarly within the knowledge of a defendant may be visited upon the defendant without legislation. Courts have for many years so ruled in particular instances, as, for example, in the medical license cases. In many other cases, however, the courts have determined that without statutory expression this rule of evidence will not be applied. Then it devolves upon the State by legislation to create the rule, as has been done in California.

The statute in our case is one dealing with burden of proof as above discussed by the United States Supreme Court rather than dealing with valuation of evidence.

It may be further remarked that "presumptions" are used in two senses. In the one sense the term is employed to convey the thought of a bridge or connecting link between one fact established and a fact sought. In that sense, since the procedure which we are to follow is evidentiary in character, there should be some logical and reasonable bearing

between the fact established and the fact to be established. Therefore, if we would go from the fact established to the fact to be established through the process of a presumption, then such presumption must from an evidentiary point of view be a rational or reasonable step from which or by means of which we can mentally step from the established fact to the fact to be established.

An exception to this rule would be where the State, from the standpoint of public policy, establishes by legislation conclusive presumptions. The courts will not disturb such presumptions so established.

On the other hand the term "presumptive" is often employed as indicating the locus or the point at or upon which one or the other of the litigants must assume the burden of going forward with evidence, else there will be indulged against him an inference or "presumption."

In the case of *People* vs. *Mallon,* 222 N. Y. 456, the New York court held that a statute creating a *prima facie* presumption, deals merely with the rules of evidence, and not with any substantive right. It is also interesting to note, in passing, that the court held in this case, as did the California Supreme Court in the case of *People* vs. *Osaki,* 209 Cal. 169, that a statute creating a presumption such as is here in issue, does not compel a defendant to give testimony against himself. As pointed out in both cases it is always open to the defendant under

such a statute to explain away the presumption by testimony other than his own. See also *Yee Hem* vs. *U. S.*, 268 U. S. 178; 45 S. C. 470; *People* vs. *Brady*, 40 Cal. 198.

Most of the foregoing cases are cited and discussed in the opinion of the District Court of Appeal in the case of *People* vs. *Morrison and Ozaki*, 125 Cal App. 282, in which case the California State Supreme Court denied a petition for hearing before that court, and the United States Supreme Court refused to entertain jurisdiction of this case. See 288 U. S. 591; 53 Sup. Ct. Rep. 401. See also *People* vs. *Nakamura*, 125 Cal. App. 268, wherein the constitutionality of section 9a, now before this court, was upheld.

We feel that logically the rule of convenience might be applied in our case, without any statute. But we have a statute, adopted in 1927, as a result of the decision of the California Supreme Court in the *Quarez* case (*People* vs. *Quarez*, 196 Cal. 404), referred to by counsel for appellants at pages 20, 21 and 24. In that case the California Supreme Court limited the rule of convenience, in the absence of a statutory provision, to license cases. And so our statutes were adopted. The Quarez decision was overruled by the California Supreme Court in the instant case. So also was the case of *People* vs. *Frey*, 165 Cal. 140, referred to at pages 22, 24 and 26 of appellants' brief.

Furthermore, we submit that no claim can be

made that this section 9a violates the equal protection of the law clause of the Federal Constitution merely because said section apparently establishes racial classification of persons, and because it may appear to place a particular or different burden upon one class. Racial classifications of persons have been held not violative of the equal protection of law clause of the Federal Constitution. See *People* vs. *Nakamura, supra,* and cases therein cited.

In 5 R. C. L. 599, section 23, we find the following declaration on that subject:

> "* * * segregation laws are likewise a legitimate exercise of the police power and not violative of the provisions of the Federal Constitution, so long as they are not discriminatory in character or destructive of vested rights."

In *Cockrill* vs. *California,* 268 U. S. 258; 45 Sup. Ct. Rep. 490, the issue presented was the constitutionality of section 9 of the California Alien Land Law, and particularly that portion thereof which provides:

> "A prima facie presumption that the conveyance is made with such intent" (of violating the California Alien Land Act) "shall arise upon proof of * * * the taking of the property in the name of a person other than the persons mentioned in section 2 hereof, if the consideration is paid or agreed or understood to be paid by an alien mentioned in section 2 hereof. * * *"
>
> (That is, by an alien ineligible to United States citizenship.)

This court in that case said, at page 262:

> "The equal protection clause does not require absolute uniformity, or prohibit every distinction in the laws of the state between ineligible aliens and other persons within its jurisdiction. The state has a wide discretion and may classify persons on bases that are reasonable and germane having regard to the purpose of the legislation. *Truax* vs. *Corrigan,* 257 U. S. 312, 337; 42 S. Ct. 124; 66 L. Ed. 254; 27 A. L. R. 375. This is well illustrated by the Alien Land Laws. *Terrace* vs. *Thompson, supra,* 218 (44 S. Ct. 15); *Porterfield* vs. *Webb, supra,* 233 (44 S. Ct. 21); *Webb* vs. *O'Brien, supra,* 324 (44 S. Ct. 112); *Frick* vs. *Webb, supra,* 333 (44 S. Ct. 115). The fact that in California all privileges in respect of the acquisition, use, and control of the land for agricultural purposes are withheld from ineligible Japanese constitutes a reasonable and valid basis for the rule of evidence."

The United States Supreme Court there held that under the provisions of the Alien Land Law there is a rational connection between the facts proved and the intent authorized to be inferred from them, and that the rule of evidence established by the statute does not operate to preclude any defense. See also *Terrace* vs. *Thompson,* 263 U. S. 197.

We shall later see, however, that the requirement of a rational connection between the fact proved and the ultimate fact presumed is to be applied in the ordinary cases of statutory presumptions; but that when we consider the common law rule of conven-

ience we are confronted by an entirely different principle. That is, we have a rule of common sense dictating no impossible burden for the State to assume; and at the same time, no undue hardship on a defendant, with reference to due process.

The rule of rational connection between a fact proved and the ultimate fact presumed has nothing to do with this case. We go to an entirely different principle—the common law rule of convenience, supplemented in our case with a statutory expression thereof.

That means that it is ridiculous to place a burden on the State that is insurmountable, when it is the simplest thing in the world for a defendant to meet it. It also means that in such a situation the other principle, applicable to statutory presumptions generally, or rational connection between the fact proved and the ultimate fact presumed, is not to be considered.

The California State Supreme Court, in *People* vs. *Osaki,* 209 Cal. 169, drew this distinction very clearly. This is the case in which the court clearly sustained section 9b of the Alien Land Act, contained in the 1927 amendments, and also used language approving of section 9a of that act, and section 1983 of the Code of Civil Procedure, added in 1927, which two latter enactments are now before this court. At pages 194 and 195 the California Supreme Court said:

"Appellants contend, and cite numerous cases

as authority in support of their contention, that a rational connection between the fact proved and the ultimate fact presumed must exist. In most all of the cases cited to the point there is no semblance of rationality between the fact proved and the fact presumed. Appellants rely with seeming assurance upon two comparatively recent decisions of the United States Supreme Court, *Manley* vs. *Georgia,* 279 U. S. (73 L. Ed. 575; 49 Sup. Ct. Rep. 215, 217), and *Western & Atlantic Railroad* vs. *Henderson,* 279 U. S. 639 (73 L. Ed. 884; 49 Sup. Ct. Rep. 445, 446). The first of these cases was upon a statute of Georgia which provided that every insolvency of a bank should be deemed fraudulent and the president and directors should be punished by imprisonment and labor in the state penitentiary for not less than one or more than ten years, provided that the defendant might repel the presumption of fraud by showing that the affairs of the bank had been fairly and legally administered. The indictment merely alleged that the appellant, being president of a certain bank, and he and two others being directors and the accused being by law charged with th fair and legal administration of the business and affairs of said bank, then and there pending, and during the official charge and responsibility of the accused said bank became fraudulently insolvent. The court, upon considering the facts to be presumed, held that they were vague and uncertain and the connection between the fact proved and that presumed was not sufficient, expressing itself as follows:

'Unforeseen demands in excess of the reserves required do not tend to show that the crime created by section 28 has been committed. The same may be said as to the other conditions defined as insolvency. The connection between the fact proved and that presumed is not sufficient.'

The rule of convenience was not discussed." (Italics supplied.)

"The other case rested upon a Georgia statute, which provided:

'A railroad company shall be liable for any damages done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.'

"In condemning the statute the court remarked that a statute creating a presumption that is arbitrary or that operates to deny *a fair opportunity to repel it* violates the due process clause of the Fourteenth Amendment." (Italics are the court's.)

"In this case *no reference was made to the rule of convenience and obviously there was no room for its application for the reason that the facts were as accessible to appellees as they were to appellants.*

Those cases and others cited by appellants in which the connection between the facts proved and the fact presumed is more arbitrary and irra-

tional than disclosed by said cases, do not change the rule approved by numerous judicial pronouncements which have been and which may readily be cited." (Italics supplied.)

We call the court's attention to the California Supreme Court's distinguishing of the cases of *Manley* vs. *Georgia*, and *Western and Atlantic R. R.* vs. *Henderson*, in answer to appellants' citation of those cases at page 44 of their brief.

With reference to the above case of *Manley* vs. *State of Georgia*, Vol. 49, Supreme Court Reporter, page 215, this case involved a banking act of Georgia of 1919 providing that every insolvency of a bank shall be deemed fraudulent as to the president and directors. This was held to be a denial of due process and in violation of the Fourteenth Amendment to the United States Constitution in that the presumption created thereby is unreasonable and arbitrary, as pointing to no specific transaction, matter or thing as the cause of fraudulent insolvency, or to any act or omission of the accused tending to show his responsibility.

The court very properly expresses the rule at page 217 as follows:

"State legislation declaring that proof of one fact or a group of facts shall constitute prima facie evidence of the main or ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. If the presumption is not unreasonable and is

not made conclusive of the rights of the person against whom raised, it does not constitute a denial of due process of law. *Mobile, J. & K. C. R. R.* vs. *Turnipseed,* 219 U. S. 35, 43, 31 S. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463. A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. *Bailey* vs. *Alabama,* 219 U. S. 219, 233 *et seq.,* 31 S. Ct. 145, 55 L. Ed. 191. Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property. 'It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' *McFarland* vs. *American Sugar Co.,* 241 U. S. 79, 86, 36 S. Ct. 498, 501 (60 L. Ed. 899).

* * * * *

The connection between the fact proved and that presumed is not sufficient. Reasoning does not lead from one to the other. *Hawes* vs. *Georgia,* 258 U. S. 1, 4, 42 S. Ct. 204, 66 L. Ed. 431. The presumption created by Section 28 is unreasonable and arbitrary. *Bailey* vs. *Alabama, supra; McFarland* vs. *American Sugar Co., supra.*"

All of this has nothing to do with the rule of convenience on which we are relying in this case. There is nothing, either in the Georgia statute or in the

language of the United States Supreme Court, remotely bearing upon the question of the propriety of shifting the burden of proof to a defendant who has within his own knowledge facts which are impossible of proof by the State.

The rule of convenience was most ably discussed and applied in *People* vs. *Velasquez,* 70 Cal. App. 362. In that case defendant was charged with a violation of a criminal statute, that is, with having under his control and in his possession a firearm capable of being concealed upon his person, he being then and there a foreign born person and not a citizen of the United States. He was found guilty as charged.

The court, at pages 366 and following, said:

"Finally, the appellant contends that, even if it be conceded that there is proof of his foreign birth, there is no evidence tending to show that he had not been naturalized. Appellant argues that not only is the burden upon the prosecution of proving all the allegations of the information but that the presumption is that every person is a citizen of the country in which he resides. We have already shown that the evidence was sufficient to prove that the defendant was an alien by birth. The presumption is that this status continues until the contrary is shown. (*Bode* vs. *Trimmer,* 82 Cal. 513, 517 (23 Pac. 187).) It was, therefore, unnecessary for the prosecution, after showing that the defendant was foreign born, to further show that he had never been naturalized.

In this connection the Attorney General has suggested that the allegation of the information, relative to the defendant not being a naturalized citizen of the United States, is an allegation of a negative fact which is peculiarly within the knowledge of the defendant, and therefore that it comes within the rule that the burden of proving such an allegation is cast upon the defendant. While no authorities are cited in support of this argument, we are nevertheless of the opinion that it is both reasonable and sound. Naturalization of an alien as a citizen of the United States is an act. It can only be proven by the record itself, or a duly authenticated copy thereof. It can not be proven by parol. (*Bode* vs. *Trimmer, supra.*) On the other hand, to prove that a person had not been naturalized would require evidence to the effect that no court of this country, having jurisdiction of naturalization proceedings, had ever granted naturalization to defendant. The rule is well settled in this State that, where the subject matter of a negative averment lies peculiarly within the knowledge of the defendant, the burden of proving the fact rests with the defendant. (8 Cal. Jur., Sec. 148.) This is an exception to the general rule that the burden of proof rests upon the prosecution, and the reason given for such exception is that it would greatly inconvenience the prosecution to prove such fact, whereas the defendant can prove it with no inconvenience at all. (8 Cal. Jur., Sec. 148.) This rule is applied in the main to prosecutions of persons charged with the violation of statutes making it illegal to

engage in certain business or to follow certain professions without first obtaining a license so to do. In most, if not in all, of the cases of which we have any knowledge, the statute designates the particular board or officer from which such a license is to be obtained. The inconvenience in such a case of procuring evidence that the accused had no such license as required by the statute can hardly be compared with that cast upon the prosecution in an action like the present, if required to prove that the defendant had not been naturalized. In the former class of cases, it would only be necessary to examine the records of one board, or the books of one officer, to ascertain whether the required license had been issued or not, and to have as a witness one person from the office of such a board, or officer, to prove the fact that no license had been issued to the accused. In an action like that before us, owing to the fact that the defendant might have been naturalized in any one of a large number of courts, it would be necessary to have as witnesses at the trial representatives or officers from all of said courts, and possibly the records themselves to show, if such were the fact, that the defendant had never been naturalized in any of said courts. Such a requirement would cast upon the prosecution an interminable amount of labor and the greatest of inconvenience. On the other hand, to require the defendant to show that he was naturalized, casts no unreasonable burden upon him. If he has had conferred upon him, by any court of competent jurisdiction, the privilege of citizenship, he either has his naturalization papers, or, if they

have been lost, properly authenticated copies thereof might be procured with little trouble or expense from the court which granted the original. We are, therefore, of the opinion that this exception to the general rule, relative to the burden of proof, should apply to actions like the present, and that it was not obligatory on the part of the prosecution to prove that the defendant had not been naturalized. His naturalization, if such were the fact, was peculiarly within his own knowledge and could have been proven by him with but little inconvenience. The prosecution having proven by competent evidence the foreign birth of the defendant, the allegation of the information that he had never been naturalized must be taken as true in the absence of proof to the contrary. (*People* vs. *Wah Hing*, 47 Cal. App. 327 (190 Pac. 662).)"

What was said in the above cited case as to the inconvenience, and in effect, the practical impossibility for the prosecution to prove affirmatively the fact of nonnaturalization of the defendant, is equally if not more applicable to the proof of the place of nativity of the defendant.

That is to say, the State could endeavor to prove that the defendant was not born in this country only by offering negative evidence that no certificates of birth on file anywhere in this country showed the birth of the defendant in this country; and could effectually establish the alienage of such defendant only by proving affirmatively his birth

in some other country. Obviously, this would be practically impossible in nearly every case.

The common law did not place the burden of proof on the prosecution where the fact to be proved (citizenship or eligibility to citizenship) is peculiarly within the knowledge of the defendant, and practically impossible of proof by the State. That was what the rule of convenience was intended for.

The case of *The King* vs. *Turner,* decided by the Court of King's Bench in 1816 and reported in 5 Maule & S. 206, is the leading common law case on the doctrine of convenience. The case was one in certiorari to review a conviction of the defendant on a charge of having certain game in his possession, not being a person qualified under the statute to have such game in his possession. There was testimony introduced proving the possession by the defendant of the game, to wit, sixteen pheasants and five hares, contrary to the form of the statute. It was charged by the defendant that it did not appear that any evidence was given in support of the information negativing the qualifications mentioned in the statute, which it was urged was necessary in order to sustain the conviction, "for if the party be qualified in any one respect, the justices have no jurisdiction."

Chief Justice Lord Ellenborough said, in deciding this case:

> "The question is, upon whom the *onus probandi* lies; whether it lies upon the person who

affirms a qualification, to prove the affirmative, or upon the informer, who denies any qualification to prove the negative. There are, I think, about ten different heads of qualification enumerated in the statute 22 & 23 Car. 2, c. 25, Sect. 3, to which the proof may be applied; and, according to the argument of today, every person who lays an information of this sort is bound to give satisfactory evidence before the magistrates to negative the defendant's qualification upon each of those several heads. The argument really comes to this, that there would be a moral impossibility of ever convicting upon such an information. If the informer should establish the negative of any part of these different qualifications, that would be insufficient, because it would be said, *non liquet,* but that the defendant may be qualified under the other. And does not, then, common sense shew, that the burden of proof ought to be cast on the person, who, by establishing any one of the qualifications, will be well defended? Is not the Statute of Anne in effect a prohibition on every person to kill game, unless he brings himself within some one of the qualifications allowed by law; the proof of which is easy on the one side, but almost impossible on the other? I remember the decision of *Rex* vs. *Stone;* and the arguments of the learned Judges, who held the necessity of giving negative proof, were undoubtedly urged with great force; but I felt at the time, that if they were right, it would, in most cases, be impossible to convict at all. But in *Spieres* vs. *Parker,* 1 T. R. 144, I find Lord Mansfield

laying down the rule, that in actions upon the game laws (and I see no good reason why the rule should not be applied to informations as well as actions) the plaintiff must negative the exceptions in the enacting clause, though he throw the burden of proof on the other side. The same was said by Heath, Jr., in *Jelfs* vs. *Ballard,* 1 B & P. 468; and such I believe has been the prevailing opinion of the profession, and the practice. I am, therefore, of opinion, that this conviction, which specifies negatively in the information the several qualifications mentioned in the statute, is sufficient, without going on to negative, by the evidence those qualifications."

Concurring in this opinion it was said by Holroyd, J.:

"I am also of the same opinion. It is a general rule, that the affirmative is to be proved, and not the negative, of any fact which is stated, unless under peculiar circumstances, where the general rule does not apply. Therefore it must be shewn, that this is a case which ought to form an exception to the general rule. Now all the qualifications mentioned in the statute, are peculiarly within the knowledge of the party qualified. If he be entitled to any such estate, as the statute requires, he may prove it by his title deeds, or by receipt of the rents and profits; or if he is son and heir apparent, or servant to any lord or lady of a manor appointed to kill game, it will be a defence. All these qualifications are peculiarly within the knowledge of the

party himself, whereas the prosecutor has, probably, no means whatever of proving a disqualification. If this be so, instead of saying that the general rule of law ought not to apply to this case, it seems to be the very case to which the rule ought peculiarly to apply.''

Here we have expressed as early as 1816 and in language that is unanswerable, the doctrine of the rule of convenience. Such has been the common law ever since, and the reason for the application of such a rule in our case is just as persuasive as it was in that case. If a defendant in possession of game must meet the burden of proving that he falls within a class permitted to kill and possess game, equally so should a defendant in possession of land prove that he comes within a class permitted to own and possess land if in fact he has peculiar knowledge of a fact easy for him to produce and most difficult, if not impossible, for the State to show does not exist.

In California an ineligible alien can not own land or have any interest therein except as may be permitted by treaty. He therefore knows that he must be a citizen or eligible to citizenship or protected by treaty rights. He knows where he was born and he knows his race. He knows whether he was born in the United States or in some foreign country. He knows whether or not he has been naturalized as a United States citizen, and, if so, where. The State has the power to create this classification and pro-

hibit any right to acquire an interest in land except as permitted in our statute and by treaty. Certainly the State is more vitally interested as a police regulation in its lands, and particularly its agricultural lands, than was the King interested in game over which he had jurisdiction and control.

In the case of *People* vs. *Boo Doo Hong,* 122 Cal. 606, the Supreme Court cited from Greenleaf on Evidence, Volume I, Sect. 79, with reference to the rule of convenience, as follows:

> "But when the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party. * * *"

Greenleaf in his text on evidence as above quoted, cited, among other cases, this leading case of *The King* vs. *Turner, supra.*

Counsel for appellants, at page 50 of his brief, just as completely misses the point when he says that:

> "It is useless, therefore, to refer to the ability of the defendants to rebut the statutory presumption and carry the statutory burden of proof, and likewise useless, as a legal question, to refer to the difficulty of proving the crime or the fact that the circumstances surrounding the crime are within the knowledge of the defendant. No such excuse has ever saved any statute condemned by the Supreme Court. Moreover, the same excuse could be made by any statutory presumption of crime. *Hardly a criminal charge can be imagined in connection with which it could not be*

said that defendant had peculiarly within his knowledge facts which could show his guilt or innocence; and almost every crime involves difficulties of proof. These are false quantities in measuring the sufficiency of a statutory presumption. The sole inquiry must be whether or not the crime itself or an essential element thereof is to be presumed without proof of the fact itself or of some other fact upon which a rational inference of guilt can be predicated.

It thus appears from the decisions of the Supreme Court of the United States, which of course are controlling on the question at issue, that the test to be applied is not whether or not defendant knows the fact nor whether the crime is difficult to prove, but whether the statute is sustained by the rational connection which all cases require."

It requires no rare discernment to appreciate that counsel for appellants is correct in saying that the fact of guilt or innocence is always within the knowledge of a defendant. But it also requires no rare discernment to appreciate that we here are considering an exceptional class of cases where it is practically impossible for the State to prove an element which a defendant can easily disprove.

Should the State be required to produce every clerk of every court in the United States having naturalization jurisdiction, to prove a defendant was never naturalized? Must the State produce every custodian of birth certificates in the United States to disprove United States birth of a defendant?

And even then, it might be that a birth certificate was never recorded.

It is a simple task for the defendant to prove either birth in the United States or naturalization by the United States. It is not only because the facts are within the knowledge of the defendant, that the rule of convenience is applicable. There is the additional element of practical impossibility of the State's meeting this burden of proof. And it is this distinction, so well discussed by the courts over a period of many years, both at common law and under statutory provisions, that is not grasped by those refusing to apply the rule of convenience in such a case as is now before this court. Included among those who do not understand this distinction is the author of the note in Vol. 17 of the California Law Review, pages 575 and following, referred to in appellants' brief at page 45.

In the case of *State* vs. *Abbey,* 67 Am. Dec. 754, there was a prosecution for the crime of bigamy. The statute recited that certain cases shall amount to that offense "except in the cases mentioned in the following section." The exceptions were described to the effect that the act would not extend to any person whose husband or wife has been continuously beyond the sea or out of the State for seven years and the party marrying not knowing the other to be living within that time, etc., etc. The Supreme Court of Vermont held that the burden was on the defendant to show that he came within the excepted

classes. Here there was no possible rational connection between the fact of marriage proved and a presumption reached that the defendant did not come within the excepted classes. The rational presumption would be, indeed, that he did come within the excepted classes.

In the case of *United States* vs. *Hayward,* 26 Fed. Cases, page 240, decided by the Circuit Court of the District of Mass. in 1815, there was an information *in rem* against 149 packages of goods seized upon land for an alleged illegal importation into the United States. The act alleged to be violated was "An act to interdict the commercial intercourse between the United States," etc., etc. Exceptions were made in the act with reference to importations in neutral vessels. The court held that the burden was upon the defendant to show the neutral character of the vessel because that fact was peculiarly within his knowledge. Here there could be no possible rational connection between the fact proved of importation and the fact presumed that the vessel was not a neutral vessel.

In the case of *State* vs. *Herman Krasne, etc.,* 170 N. W. 494, the defendant was charged in the state of Nebraska with having violated a statute of that State in causing to be inserted in a newspaper an advertisement containing statements which were untrue. The court held that the defendant must prove the truthfulness of his statements because this was a matter peculiarly within his knowledge. Here

again there could be no possible rational connection between the fact proved of an advertisement being published, and the fact presumed of its untruthfulness.

In the case of *United States* vs. *Tria,* 17 Philippines 303, there was a prosecution for criminal violation of the election law in that the defendant voted without being qualified so to do. The Supreme Court of the Philippines held that the burden was upon the defendant to show his statutory qualifications because these facts were peculiarly within his knowledge. There could have been no possible rational connection between the fact of his voting having been proved and a fact presumed that he was not qualified. And so, it may be said that the rule of convenience is an exception to the rationality rule.

In the case of *State* vs. *McCaffrey,* 37 Atl. 234, the Supreme Court of Vermont was construing a Vermont statute making it the duty of a person having control of a child between the ages of eight and fifteen years to cause such child to attend public school for a certain time each year, unless the child is mentally or physically unable to attend, has already acquired the branches required to be taught in the public schools, or is otherwise being furnished with the same education. At pages 235 and 236 the court said:

"Section 711, V. S., makes it the duty of a person having the control of a child between

the ages of 8 and 15 years to cause such child to attend a public school at least 26 weeks in a year, such attendance to begin with the school year, and be continuous, unless the child is mentally or physically unable to attend, has already acquired the branches required to be taught in the public schools, or is otherwise being furnished with the same education."

* * * * *

"The respondent contends that to establish the offense it was incumbent upon the state to negative the exceptions in the statute. The rule is that the exceptions must be negatived only where they are descriptive of the offense, or define it; but where they afford matter of excuse merely, and do not define nor qualify the offense created by the enacting clause, they are not required to be negatived. In this case the exceptions are not descriptive of the offense. If the respondent came within either of the exceptions, the fact was peculiarly within his knowledge, and should have been proved by him as matter of defense. The cases cited by the state and by the respondent support this rule. Judgment that there was no error and that the respondent take nothing by his exceptions."

In our statute the Legislature by positive law shifts the burden to the defendant if the facts are peculiarly within his knowledge. If, so far as the *corpus delicti* is concerned, the burden should shift merely as a result of changed phraseology in a statute placing the exception, as, being mentally

or physically unable to attend, or having already been taught the necessary branches, in a proviso, rather than in the description of the offense, what conclusion may we draw in our case?

Surely, the same result would follow when we have a separate statute particularly providing that the burden so shifts.

In Volume 16 of Corpus Juris, page 530, section 998, under "Criminal Law," we find the following text:

> "FACTS PECULIARLY WITHIN DEFENDANT'S KNOWLEDGE. Where the subject matter of a negative averment in the indictment, or a fact relied upon by defendant as a justification or excuse, relates to him personally or otherwise lies peculiarly within his knowledge, the general rule is that the burden of proof as to such averment or fact is on him."

We shall consider all of the cases cited in support of this text, except those cited elsewhere in this brief.

Gains vs. *State,* 43 So. 137. This is an Alabama case. The defendant was convicted of riding on a freight car without authority from the conductor of the train or permission of the engineer, and with the intention of being transported free. The statute made it a crime to do so when the defendant was not an employee engaged in the discharge of his duties. The defendant asked for certain charges

to the jury in substance that the burden of proof was on the State to prove beyond reasonable doubt that at the time he was riding he was not an employee of the road and engaged in the discharge of his duties; that he was riding on the train without the permission and consent of the conductor or engineer in charge of the train; that the State must show that at the time he was riding he had not paid his fare—all of which charges were refused. The Supreme Court of Alabama said, at page 138:

> "On the authority of *Farrall* vs. *State,* 32 Ala. 557, and *Freiberg* vs. *State,* 94 Ala. 91, 10 South 703, and the reasons there stated, the burden of proof was not on the State to prove the negative averment in the affidavit. *This was matter of defense particularly within the knowledge of the defendant.*" (Italics ours.)

No statute is referred to as creating the presumption.

Commonwealth vs. *Bull,* 76 Kentucky 656 (XIII Bush).

In an indictment for vending a ticket purporting to be in the Kentucky State lottery, for the benefit of the University of Paducah, it was held not incumbent on the commonwealth to aver and prove that the ticket sold was not issued by or under the authority of the grantee of a subsisting lottery privilege. At page 666 the court said:

> "This rule imposes no hardship on the ap-

pellee. * * * It is a fact peculiarly within the knowledge of the parties who manage and conduct the lottery, and as the defense relies on the ground that the ticket sold was issued by parties acting under the authority of an unexhausted and subsisting lottery grant, it is but reasonable and proper that he shall be required to establish the negative fact upon which his right to immunity from punishment depends. (Greenleaf on Evidence, Vol. 1, Sec. 79.)"

No statute creating the presumption is referred to.

Williams vs. *People,* 11 N. E. 881.

In this case there was considered by the Supreme Court of Illinois a statute of that State regulating the practice of medicine and prescribing the requisite qualifications to be possessed by physicians.

There was a proviso in the act that it should not apply to those who have practiced medicine for ten years. There was no evidence introduced by the State to show that the defendant did not come within the language of said exception.

The court sustained the proposition that the burden was on the defendant to show that he came within this exception. See the language of the court at pages 882-883.

There was no statute creating the presumption in this case.

State vs. *Wilson,* 64 Pac. 23.

The Kansas statute passed on by the Supreme

Court of Kansas was a medical practice act. The point arose as to whether the trial court erroneously placed the burden of proof upon the defendant. On this point the court, at pages 24 and following, said:

> "Complaint is made that the court below erroneously placed the burden of proof upon the defendant. The statute provides that 'it shall be unlawful for any person * * * who has not attended two full courses of instruction and graduated in some respectable school of medicine, either of the United States or of some foreign country, or who can not produce a certificate of qualification from some State or county medical society, * * * to practice medicine in any of its departments for reward or compensation.' Gen. St. 1899, Sec. 2302. * * * 'The statutes of Kansas require that, before any person can legally practice medicine for compensation in this State, he must have attended two full courses of instruction and graduated in some respectable school of medicine, either of the United States or of some foreign country, or be able to produce a certificate of his qualification from some State or county medical society. The burden of introducing some evidence tending to prove such qualification is on the defendant.' "

The court held that this burden of showing qualification was on the defendant.

It is interesting to note in this case that the court very carefully limits the rule of evidence in discussing the liquor license cases, even more so than is the

rule in California. That is, the court holds that where it would be convenient for the State to prove that the defendant did not have a license or certificate to sell liquor, the State should be required to make this proof, the reason being that the fact is as accessible to the State as to the defendant. But even in such a case, assuming the fact to be as accessible to the State as it is to the defendant, the court says at page 26, column 2:

> *"And in the absence of a statutory regulation relieving the State from the duty of proving that one charged with the unlawful sale of intoxicating liquor did not have a permit therefor,* because the reason for the rule fails in such a case the rule itself ought to fail, and the State, having access to admissible evidence, ought to be required to produce it. This is in accord with earlier decisions of this court. *State* vs. *Schweiter,* 27 Kan. 499; *State* vs. *Nye,* 32 Kan. 201, 204, 4 Pac. 134, 136. In other words, where evidence to prove the negative averment is not peculiarly within the knowledge of the defendant, but is also within the knowledge and control of, or upon reasonable effort and by the exercise of proper diligence may be secured by, the State, then and in such case the prosecution is bound to produce such evidence, and failing to do so, the defendant ought to be acquitted." (Italics supplied.)

Here we have a judicial expression that, even though the fact would be as accessible to the State

as to the defendant, it would be lawful for the State *by statute* to shift the burden of proof to the defendant.

State vs. *Zehnder,* 168 S. W. 666.

It was decided by the Springfield Court of Appeals in Missouri, that in a prosecution of officers of a corporation for violation of the local option laws, defended on the ground that they were incidental sales by a bona fide corporation to members only, the burden was on defendants to prove such facts as would bring them within the exception to the local laws, if there were such an exception.

There was no statute creating a presumption.

State vs. *Carlisle,* 139 N. W. 127.

This is a case decided by the Supreme Court of South Dakota. There was an indictment for practicing dentistry without a license. The act stated that its provisions shall not apply to students attending a dental college and performing acts of dentistry under the supervision of a preceptor or licensed dentist. The court held that where no evidence was offered on either side, the court did not err in refusing to charge that the accused could not be convicted for any period during which he was enrolled as a student, since the burden was on the defendant to produce evidence raising this issue.

The court further held that when the subject matter of a negative averment in an indictment or

information relied on by accused as a justification or excuse lies peculiarly within his knowledge, the burden of proof as to such justification or excuse is on him.

Ake vs. *State,* 32 Amer. Rep. 586.

In this case the Texas Court of Appeals decided that where by law the death penalty can not be inflicted for a given offense committed by a person of less than seventeen years of age, the burden of proof showing his nonage is on the defendant.

There was no statute in this case creating any presumption.

State vs. *Casto,* 132 S. W. 1115. Supreme Court of Missouri.

Prosecution for the offense of procuring a fatal abortion. The statute declared this a crime "unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by a physician to be necessary for that purpose."

The information negatived these exceptions in the statute.

The State proved that the woman operated on was, prior to the operation, in perfect health. Then as to the burden of proof shifting to defendant to prove that the operation was necessary the court, at page 1118, col. 2, says:

> "If the burden was on the state to prove this negative, we think when it appeared by the

uncontradicted testimony that up to the very hour Anna Bell was taken to the Stotts house, she was in perfect health, the burden then shifted to defendants to show that the abortion was necessary to preserve her life, *because if such was the case and abortion had been resorted to for that purpose, the necessity was a matter peculiarly within the knowledge of defendant and the doctor.*" (Italics supplied.)

There was no statute creating this presumption.

Faraone vs. *United States,* 259 Fed. 507.

The defendant was tried on an indictment charging that at Memphis, Tennessee, he "did carry on the business of a retail liquor dealer without having paid the special tax therefor, as required by law."

It was decided that proof of the negative averment that the special tax required by law was not paid was not necessary in this case.

The court, at page 509, says:

"If payment had been made, the fact was peculiarly within the defendant's knowledge, and he could have shown it without inconvenience."

There was no statute creating any presumption.

Folmar vs. *State,* 97 So. 768.

Here we have a prosecution, under an Alabama statute, of a mortgagor for selling the mortgaged property, and the court decided that the burden was on the defendant to show that the mortgagee had

given his consent to the sale. The court held that a negative averment as to a matter peculiarly within the knowledge of the other party is taken as true unless it is disproven by the latter. The exact phraseology of the statute is not given.

At pages 769 and 770 the court said:

> "The burden was not upon the state to show that the holder of the mortgage did not consent to a sale of the mortgaged property. The state having proven the mortgage, the existence of the debt, and the sale of the mortgaged property by the defendant, discharged the burden resting upon it, and the burden was then on the defendant, if he relied upon that defense, to introduce evidence to show that the mortgagee consented to a sale of the mortgaged property."
>
> * * * * *
>
> "The burden of proving the consent of the mortgagee to a sale of the mortgaged property was on the defendant; the consent being in the nature of a license to him and being peculiarly within his knowledge."

We here have no statute creating any presumption.

Clark vs. *State,* 243 S. W. 865.

The indictment, under an Arkansas statute, charged that the defendant had kept in his possession certain stills without registering the same with the proper United States officer. The exact language of the statute is not given. Applying the rule of convenience the court, at page 866, said:

"The state proved that the still was found in appellant's possession, but no evidence was offered that he had not registered it with the proper United States officer, and the court refused an instruction requested by appellant that the burden of showing this fact was on the state. No error was committed in refusing this instruction, as it was held in the case of *Moore* vs. *State* (Ark.), 240 S. W. 1083, that this was a negative averment, particularly within the appellant's knowledge, and should have been disproved by the appellant himself. See, also, *Ring* vs. *State* (Ark.), 242 S. W. 561."

There was no statute creating the presumption.

United States vs. *Turner,* 266 Fed. 248.

In a prosecution under the National Prohibition Act for removing liquor without a permit it was held that the government need not prove want of a permit to make out a prima facie case.

The statute, being section 6 of the Volstead Act, reads that "no one shall * * * transport * * * any liquor without first obtaining a permit from the commissioner so to do, except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician, as herein provided * * *."

At page 251 the court said:

"I assume that in a prosecution for transporting liquor without a permit the government would not have to prove the want of a permit in order to make out a prima facie case."

Here we have no statute creating a presumption.

Smith vs. *Commonwealth,* 244 S. W. 407.

This is a Kentucky case, decided by the Court of Appeals of Kentucky. An indictment charged the unlawful sale of intoxicating liquor in violation of a Kentucky statute denouncing the sale of liquor except for sacramental, medicinal, scientific or mechanical purposes. It was held that the indictment must allege that the sale of the liquor by the defendant was not for these particular purposes. The exact phraseology of the statute is not given.

Applying the rule of convenience, the court, at page 407, says:

> "The ground upon which the appellant rests his contention that the court should have directed a verdict of not guilty, and erred in refusing to do so, is that the commonwealth did not prove that the sale of the liquor was not for a sacramental, medicinal, scientific, or mechanical purpose, and, such being necessary allegations in the indictment, there was a failure of evidence to sustain the indictment and to prove the commission of a public offense."

At page 408, after stating that it is necessary to allege in the indictment that the defendant did not come within any of the exceptions created by the statute, the court again refers to the rule of convenience with reference to proof as follows:

> "We are not of the opinion, however, that in order to sustain a conviction the commonwealth

must assume the burden and prove that the purpose for which the liquors were sold was not for a sacramental, medicinal, scientific, or mechanical purpose. . To require the commonwealth to do this would be to require it to prove a negative, and, while the general rule applying to criminal prosecutions is that if the negative averments are an essential to making out the offense, the burden rests upon the commonwealth to do so, *except in the class of negatives which it is almost impossible to prove affirmatively, and the truth of the negative is peculiarly within the knowledge of the defendant, who is able forthwith and without inconvenience to demonstrate by evidence the truth touching it.* In such instances when the commonwealeth has proven an act which is forbidden to be done by statute, by all persons, except those of a particular class, or excepting certain qualified persons, a prima facie case is made out, and the negative averment is taken as true, unless disproved by the defendant. It is a general rule running through the law of evidence that where the negative of an issue does not permit of direct proof, or where the facts are more immediately within the knowledge of the defendant, the burden of proving that such averment is not true rests upon him." (Italics supplied.)

With reference to the above italicized language, it will be found that the court in this case refuses to apply the rule as to compelling proof by the State when negative averments are essential to making out the offense in those classes of cases

where the rule of convenience should apply. That is, the rule of convenience is an exception to the *corpus delicti* rule.

Roberts vs. *State,* 234 S. W. 89.

This is a case decided by the Court of Criminal Appeals of Texas.

It was decided that in a prosecution under a State statute for the manufacturing of liquor, when the evidence shows that the defendant manufactured liquor or possessed equipment for making liquor, then the burden is on the defendant to show that such manufacturing or possession was either for mechanical, medicinal, scientific or sacramental purposes. The court finally decided that the following instruction by the trial court was a proper instruction:

> "The state is not required to prove in the first instance that the manufacture of vinous liquor capable of producing intoxication or the possession of any equipment for making such vinous liquor or whisky was not for either medicinal, mechanical, scientific, or sacramental purposes; but, when the evidence shows that the defendant manufactured such vinous liquor or did possess equipment for making such vinous liquor or whisky, then the burden is on the defendant to show that such manufacture or possession was for either mechanical, medicinal, scientific, or sacramental purposes."

(See page 90, column 1, of Vol. 234 S. W. Reports.)

At page 90, column 2, the court said that:

> "Where the facts necessary to support such negative averment lie peculiarly within the knowledge of the accused, the burden of proving same is cast on him."

There was no statute in this case creating any presumption.

People vs. *Hollenbeck,* 153 N. E. 691.

This case was decided by the Supreme Court of Illinois.

The defendant was indicted for the violation of the Illinois prohibition act (Laws 1921, page 581). The indictment charged the selling of intoxicating liquor, the said sale not coming within certain exceptions contained in the act. One of these exceptions was the obtaining of a permit from the attorney general to sell intoxicating liquors, etc.

On the question of burden of proof of facts peculiarly within the knowledge of the defendant, the court, at page 693, said:

> "The court did not err in refusing to give to the jury the defendant's refused instruction to the effect that the burden was upon the state to prove that the defendant did not have a permit from the Attorney General to sell intoxicating liquor, etc. The general rule is, in prosecutions for criminal offenses, that where the subject-matter of a negative averment lies particularly within the knowledge of the defendant, the averment, unless disproved by the defendant, will be

taken as true. *People* vs. *Montgomery,* 271 Ill. 580, 111 N. E. 578; *Kettles* vs. *People,* 221 Ill. 221, 77 N. E. 472; *Williams* vs. *People,* 121 Ill. 84, 11 N. E. 881; *Noecker* vs. *People,* 91 Ill. 468."

There was no statute creating a presumption in this case.

Ex parte Kreutzer, 204 N. W. 595.

This case was decided by the Supreme Court of Wisconsin.

There was an indictment for a violation of the blue sky law (Statutes 1923, sections 183.25 to 183.44.) It was held that the indictment was not defective for failure to negative statutory exceptions. Section 183.26 provided: "Except as hereinafter provided, the provisions of sections 183.25 to 183.44, inclusive, shall not apply to" certain classes of securities therein named, and then these classes are described.

Section 183.27 (1) states:

> "Except as provided in subsections (4) and (5) hereof no company, broker, or other person, directly or through an agent shall in this state sell, offer for sale, negotiate for the sale of, take subscriptions for, or exchange for property any security for the sale of which a permit has not theretofore been issued, until there shall have been first applied for and secured from the commission a permit authorizing the sale of such security."

Subsection (4) provided that under certain condi-

tions brokers authorized by the commission to act may sell class A securities before applying for or securing a permit. Among these conditions was one that a bond for twenty thousand dollars should be given, conditioned as specified.

Subsection (5) provided that brokers authorized by the commission might sell securities issued prior to a certain date without a permit.

Referring to the rule that the burden is on the defendant where the exception or qualification is in a separate section, distinct from the enacting clause, the court, at page 601, said:

> "It was the common-law rule that, where an exception or qualification is in a separate section of the statute or in a proviso which is distinct from the enacting clause it is a matter of defense which the prosecution need not anticipate in the pleadings."

Referring to the general rule of convenience and citing the leading common law case of *King* vs. *Turner,* 5 Maule & Selwyns Reports, 206, the court, at page 601, says:

> "The further argument is made that the offenses charged were not proven by any competent evidence. The principal objection now made is that the state did not prove that the sales were those of securities not exempted or excepted by the statute."
>
> * * * * *
>
> "In a leading case, decided more than one hun-

dred years ago, where the defendant was accused of unlawfully having game in his possession, Lord Ellenborough said:

'There are, I think, about ten different heads of qualifications enumerated in the statute, to which proof may be applied, and according to the argument of today every person who lays an information of this sort is bound to give satisfactory evidence before the magistrate to negative the defendant's qualification upon each of those several heads. The argument really comes to this, that there would be a moral impossibility of ever convicting upon such an information. * * * And does not then common sense show that the burden of proof ought to be cast upon the person, who by establishing any one of the qualifications will be well defended, is not the Statute of Anne in effect a prohibition on every person to kill game unless he brings himself within some one of the qualifications allowed by law the proof of which is easy on the one side, but almost impossible on the other?' *King* vs. *Turner*, 5 Maule & Selwyns Reports, 206."

We have here no statute creating a presumption. In *State* vs. *Whittier*, 21 Maine 341, 38 Am. Dec. 272, it was held that the burden of proving that a certain offense against property was committed with the owner's consent rested on the accused, that being a fact peculiarly within his knowledge.

In the case of *People* vs. *Volcano Canyon Toll Road Co.*, 100 Cal. 87, an information in the nature of a quo warranto was brought by the Attorney

General. The fact in issue was the exercising of a franchise. The court held the burden to be on the defendant to show by what warrant or authority it claimed and exercised the franchise. "There was no attempt to show any warrant or authority whatever. The judgment therefore was proper."

In *State* vs. *Clark,* 178 N. W. 419, it was held that the burden of proof was on the owner of a house of prostitution to show that he had no knowledge of the use to which the house was subjected.

In *State* vs. *Lipscomb,* 52 Mo. 32, it was held that where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, it is taken as true, unless disproved by that party.

Indictment for selling liquor without a license.

Held, defendant must produce license because subject matter of negative averment in indictment lay peculiarly within his knowledge.

There was no statute creating the presumption.

State vs. *Keggon,* 55 N. H. 19.

Indictment for violating statute prohibiting sale of liquor and affirmatively alleged he was not agent for sale of liquor.

Held, State not required to prove this averment. Rule of convenience applied.

There was no statute creating the presumption.

People vs. *Nyce,* 13 Hun. 298.

Under New York statute (Laws of 1874, Chapter

436, Sec. 3) defendant was convicted of the offense of practicing medicine without being authorized so to do "by a license, or diploma from some chartered school, State Board of Medical Examiners, or Medical Society."

Held, burden on defendant to show he was so licensed.

There was no statute creating the presumption.

State vs. *Arnold,* 35 N. C. 184.

Held, that where the defense on an indictment for murder is that the prisoner is under the age of presumed capacity, the onus of proof lies on the defendant. At page 192 the court says:

> "As the subject of direct proof the onus was certainly on the prisoner, as the reputed age of every one is peculiarly within his own knowledge, and also the persons by whom it can be directly proved."

There was no statute creating the presumption.

In Greenleaf on Evidence, Part II, Chapter III, Sec. 79, page 111, we read:

> "Negative allegations. But where the subject-matter of a negative averment lies *peculiarly within the knowledge* of the other party, the averment is taken as true, unless disproved by that party. Such is the case in civil or criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any persons, except those who are duly

licensed therefor; as, for selling liquors, exercising a trade or profession, and the like. Here, the party, if licensed, can immediately show it, without the least inconvenience; whereas, if proof of the negative were required, the inconvenience would be very great."

Jones on Evidence, 2d Edition, section 181, which is entitled "Burden as to particular facts lying peculiarly within knowledge of a party" has the following to say on this general subject matter:

"On principles already discussed the burden of proof as to any particular fact rests upon the party asserting such fact. The burden of proof may during the course of the trial be shifted from one side to the other; and where the fact is one peculiarly within the knowledge of one of the parties, slight evidence may suffice for that purpose. Many illustrations in this chapter clearly show that where the *facts lie solely within the knowledge of one party,* this is an important consideration in determining the amount of evidence necessary to be produced by the other party. 'The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the burden of proving the fact shall lie on any particular person; but the burden may in the course of a case be shifted from one side to the other; and in considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respect-

ively.' This is often illustrated in prosecutions for selling liquor or doing other acts *without the license* required by law. By a few authorities the rule is prescribed that in such cases the prosecution must offer some slight proof of the fact that no license has been granted, for example, by producing the book in which licenses are recorded; and if the book fails to show that a license has been granted, the burden is shifted upon the defendant to prove the fact claimed by him; but the greater number of authorities hold that where a license would be a complete defense, the burden is upon the defendant to prove the fact so clearly within his own knowledge."

No one has a right to acquire an interest in real property in this State unless he is either a citizen or eligible to United States citizenship, unless he is accorded such right by a treaty. If a person is found in possession of real property and it is charged that he is violating the Alien Land Act, the law simply throws upon him the burden of proving that he does not fall within the category of persons who are prohibited from enjoying real property in this State.

Similarly the law forbids an alien from carrying a concealed weapon at all, and therefore prohibits him from carrying such a weapon without a license. If he is found in possession of such a weapon the law simply throws upon him the burden of proving that he does not fall within the category of persons who are prohibited from carrying such weapons.

The presumption is not conclusive; it is merely *prima facie*. Therefore, it can not be said that, being an absolute presumption, the statute may be regarded as one of substantive law.

The presumption in our case is not one of evidentiary or probative effect, nor is it intended to be of that character. It is intended by the State, speaking through the Legislature, to regulate by this presumption the *order* of proof; in other words, the procedure, placing the burden upon the State to prove the fact of possession or the fact of the defendant's having assumed to take title.

Whereupon, such proof having been made, there devolves upon the defendant the burden of establishing the fact by evidence that he is either a citizen or is eligible to United States citizenship, or is protected by a treaty and for that reason the proof of the plaintiff will not support a judgment in its favor against said defendant, in a case where the defendant shall have established his eligibility.

It may be further remarked that "presumptions" are used in two senses. In the one sense the term is employed to convey the thought of a bridge or connecting link between one fact established and a fact sought to be established. In that sense the procedure which we are to follow being evidentiary in character, it might be argued that there should be some logical and reasonable bearing between the fact established and the fact to be established. Therefore, if we would go from the fact established

to the fact to be established by the form of a presumption, then it may be claimed that such presumption must from an evidentiary point of view be a rational or reasonable step from which or by means of which we can mentally step from the established fact to the fact to be established.

An exception to this rule would be where the State, from the standpoint of public policy, establishes by legislation conclusive presumptions. The courts will not disturb such presumptions so established.

Another exception has been made in many cases, as above noted, when, in fact, the rule of convenience should be applied. And so, we really are not compelled to depend upon the other use of the word "presumption" which we are about to discuss.

That is, the term "presumption" is often employed as indicating the locus or the point at or upon which one or the other of the litigants must assume the burden of going forward with evidence, else there will be indulged against him an inference or "presumption."

We again quote the language of the Supreme Court of the United States, speaking through Mr. Justice Holmes, in *Casey* vs. *United States, supra* (276 U. S. at 418):

> "There are presumptions that are not evidence in a proper sense, but simply regulations of the burden of proof. *Greer* vs. *United States,* 245 U. S. 559. The statute here talks of *prima*

facie evidence but it means only that the burden shall be upon the party found in possession to explain and justify it when accused of the crime that the statute creates. 4 Wigmore, Evidence, Sec. 2494. It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the government. 4 Wigmore, Evidence, Sec. 2486.'"

There are some instances where this burden of proving facts peculiarly within the knowledge of a defendant may be visited upon the defendant without legislation. Courts have for many years so ruled in particular instances, as, for example, the medical license cases. In many other cases, however, the courts have determined that without statutory expression this rule of evidence will not be applied. Then it devolves upon the State by legislation to create the rule, as has been done in California.

The statute in our case is one dealing with burden of proof as above discussed by the United States Supreme Court rather than dealing with valuation of evidence.

B. Analysis of Cases on Rule of Convenience Showing That in Many of Them It Is Applied Even Though They Did Not Involve Liquor License or Medical or Dental Licenses.

In reading some forty-five cases decided by the

courts of last resort in twenty different States of the United States, which are referred to as supporting the text on the rule of convenience in Corpus Juris, it is interesting to note that in fully one-half of these cases there was no question involved with reference to liquor licenses or medical or dental licenses. As showing that the application of the rule in other jurisdictions is by no means restricted to license cases, we may point out that the broad sweep of the application of the rule is suggested by the following typical instances:

The riding on a freight car without permission from the conductor when not an employee. The defendant must show he was an employee.

A prohibition against working on Sunday other than work of daily necessity. Defendant must show the necessity.

Prohibition against selling of lottery tickets except under a lottery grant by the State. Defendant must show the grant.

Requirement that parents send child to school unless child mentally or physically unable to attend school. Defendant must show this inability.

Crime of bigamy with certain exceptions. Defendant must show exceptions.

Crime of committing an abortion, with exceptions, as necessity to save life. Defendant must show such necessity.

Prohibition against mortgagor selling mortgaged

personal property except with the consent of mortgagee. Defendant must show the consent.

Prohibition in blue sky law against selling stocks without permit unless exceptional circumstances appear. Defendant must show the circumstances.

Prohibition against importation of goods except in a neutral vessel. Defendant must show that the vessel was neutral.

Prohibiting offense against owners' property except with the consent of the owners. Defendant must show the consent.

Prohibition against exercising a franchise except by authority. Defendant must show the authority.

Prohibition against operation of house of prostitution—prosecution against owner of the property—the defendant must show that he had no knowledge of the use of the property.

In defense of nonage in a murder trial, defendant must show nonage.

Prohibition against unnaturalized foreigner carrying concealed weapon. Defendant must prove naturalization.

Prohibition against aiding an offender, unless the defendant husband or wife, etc. Defendant must prove relationship.

Prohibition against advertising by making false statements. Defendant must prove truthfulness of his statements.

Prohibition against voting unless qualified. Defendant must prove qualifications.

C. Analysis of Appellants' "Statement of the Points on Which Appellants Rely."

We shall now refer to some statements found in the "Statement of the points on which appellants rely," which we consider to be subject to criticism.

In Points XXV, XXVI, XXVII, XXVIII, XXIX and XXX, counsel for appellants relies entirely upon the rationality rule. That rule is not controlling in this case. The rule of convenience is.

In Points V, IX, XXIII and XXIV, counsel for appellants erroneously says that the California Supreme Court held that, under the California statutes, there was a rational connection between the facts proved and the ultimate facts found. The court particularly relied on the rule of convenience, and not at all on the rationality rule. The same error is made at page 23 of appellants' brief.

In Points II and IV, the appellants erroneously state that the California Supreme Court construed the California statutes as placing upon appellant Doi the burden of showing he is a citizen of the United States by reason of birth or naturalization, "solely by reason of the allegation of his ineligibility to citizenship in the indictment."

The statutes further require actual proof by the State of acquisition, possession and enjoyment, etc., of the real property involved. The same error is made at page 18 of appellants' brief.

Similarly, in Point XXV, counsel states that the

inference that defendant Doi, being in possession of agricultural lands is therefore an alien ineligible to citizenship, is unreasonable and purely arbitrary.

The statutes, however, also require allegation of ineligibility. The same criticism is pertinent to Points XXVIII and XXIX.

Counsel for appellant erroneously suggests in Points XVIII and XIX, that the California statutes cast upon defendant Doi the burden of proving his citizenship or eligibility to citizenship "as a prerequisite to the enjoyment and occupation," etc., of real estate in California, for agricultural purposes. And further, counsel is in error in saying that the California Supreme Court so held.

There is no such "prerequisite" except as a defense, after action brought by the State.

In Points I, II, IV, XVII and XVIII, reference is made to the Constitution of the State of California being violated by the statutes now before this court. Also at page 23 of appellants' brief the same point is urged.

The decision of the court of last resort of the State is conclusive in the matter of the proper construction of the State Constitution as related to this subject matter. See Hughes on Federal Practice, Vol. V, section 3242, page 331, where the rule is stated as follows:

> "The question whether or not a state statute conflicts with the constitution of the state does not present any question for review by the

> Supreme Court of the United States. That court will regard such a question as settled by the highest court of the state."

Counsel for appellants, in Point XX, urges that the Supreme Court of California erred in holding that the State Legislature, by the statutes now before this court, has cast the burden upon those whose eligibility is challenged in the name of the State, of proving such eligibility.

This is, of course, a matter of statutory construction, and it is well established that this court will not disturb the ruling of the court of last resort in California on that question:

> "The meaning attributed by the highest court of a state to a statute of the state must be accepted by the Supreme Court, on review, as though such meaning had been specifically expressed in the statute."
>
> Hughes Federal Practice, Vol. 5, Sec. 3241, page 331.

II

ANALYSIS OF CASES CITED BY APPELLANTS TO SHOW THAT NO ONE OF THEM IS IN POINT IN THE MATTER OF THE QUESTION BEFORE THIS COURT, THE ANSWER TO WHICH QUESTION IS TO BE DETERMINED BY THE RULE OF CONVENIENCE.

McFarland vs. *American Sugar Refining Company,* 241 U. S. 79 (appellants' brief, pp. 18, 27 and 49).

This case considered a statute of Louisiana which purported to impose penalties for monopoly and conspiracies in restraint of trade. The statute provided as follows:

> "Any person engaged in the business of refining sugar within this state who shall systematically pay in Louisiana a less price for sugar than he pays in any other state, shall be prima facie presumed to be a party to a monopoly or combination or conspiracy in restraint of trade and commerce, and upon conviction therefor shall be subject to a fine * * *."

The United States Supreme Court held that this presumption was invalid because it violated the Fourteenth Amendment to the United States Constitution.

The court stated the rule relied upon by counsel for appellants, that it is "essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate."

The court held that the presumption created in the statute had no relation in experience to general facts. It will be noted that there is nothing in the statute nor could there possibly be anything in the decision of the court involving the other equally well established rule of convenience. That is, there was not involved a situation where facts are

peculiarly within the knowledge of a defendant, and where, therefore, it is reasonable by statutory provision to relieve the State of the impossible burden of proving that which it is so easy for the defendant himself to disprove.

In the case of *State* vs. *Lapointe,* 123 Atl. 692, cited by counsel for appellants at pages 19 and 35 of his brief, the court considered a statute of the State of New Hampshire which made the possession of intoxicating liquor *prima facie* evidence of a violation of a statute prohibiting such possession, unless the liquor was lawfully procured.

The statute was held valid.

The discussion by the court of the unconstitutionality of the statute if construed as making such possession more than *prima facie* evidence, has nothing whatever to do with the rule of convenience. The court assumes that it was well within the power of the State to prove that the liquor was not lawfully procured.

Counsel for appellants apparently reads the language of the court criticizing many cited decisions, as leading to a conclusion against the application of the rule of convenience.

So read, this language suggests a minority rule clearly opposed by the many cases cited by the court.

Brightman vs. *United States,* 7 Fed. (2d) 532 (appellants' brief, p. 28).

This case considered the Harrison Narcotic Act. The statute provided that the possession of drugs would be *prima facie* evidence of the violation of the act. The court held that there was no such rational connection between the fact of the possession of morphine in the western district of Oklahoma and the fact of the purchase of it in that same district as to make the former *prima facie* evidence of the latter.

The court said "common experience does not support such a presumption."

There was nothing in this case requiring or in fact permitting the court to discuss the reasons for and justification of the rule of convenience.

O'Neill vs. *United States,* 19 Fed. (2d) 322, (appellants' brief, p. 28).

This also was a prosecution for a violation of the Harrison Narcotic Act. The defendant was convicted of the offense of selling drugs without paying the special tax required by the act. The prosecution relied upon the *prima facie* presumption which was claimed to arise under the statute from the possession of unstamped drugs.

Referring to the limitations on the power of Congress or the State Legislature to enact that when certain facts have been proved they shall be *prima facie* evidence of the existence of the main fact in question, the court said:

"The limitations are these: There must be

some rational connection between the fact proved and the ultimate fact presumed; the inference of the existence of the ultimate fact from proof of another fact must not be so unreasonable or unnatural as to be a purely arbitrary mandate."

The court held that Congress could not reasonably enact that possession of unstamped narcotic drugs should be *prima facie* evidence of a violation of the act. This case has no bearing whatever on the rule of convenience which we are contending for in our case.

State vs. *Divine*, 98 N. C. 778; 4 S. E. 477 (appellants' brief, page 30).

A North Carolina statute prohibited the negligent killing of live stock by a railroad.

The statute provided that when stock was killed or injured by a running engine in certain counties, proof of that fact should be *prima facie* evidence of the negligence of certain specified officials of the railroad company. The statutory presumption was held to be void because unsupported by any reasonable connection between the proof and the inference of guilt.

Here again there is nothing involved concerning the existence of certain facts being known to the defendant and impossible of proof by the State.

In re Opinion of Justices, 208 Mass. 619, 94 N. E. 1044 (appellants' brief, page 30).

The Massachusetts statute provided that working

more than eight hours in any one day should be *prima facie* evidence of the violation of a statute forbidding persons from working more than eight hours per day except that employees given a Saturday half holiday might work more then eight hours the other days of the week.

The court held this statute invalid. The court said:

> "There are many statutes in which the Legislature has enacted that the existence of a fact which ordinarily created a strong probability of the commission of an offense shall be *prima facie* evidence of guilt, and such statutes have been held constitutional. * * * The provision of this section of the proposed act differs from those referred to in these decisions and is not within the principles on which the cited cases rest. Under this act, 'in cases where a Saturday half holiday is given' employees may work more than eight hours on other days of the week. Such cases will be common, and, on all of them work for a longer time than eight hours on any other day will not indicate the probability of violation of the law. To provide that such a fact shall constitute *prima facie* evidence that warrants a finding of guilt beyond a reasonable doubt, would be contrary to the fundamental purposes of criminal law. * * * We are of the opinion that the Legislature has no constitutional authority to punish any citizen merely upon evidence of the existence of a fact, which, in ordinary cases, has no tendency to establish guilt."

There is nothing in that case remotely allied to the consideration for sustaining the reasonableness of statutes creating the rule of convenience.

State vs. *Grimmett,* 33 Idaho 203; 193 Pac. 380 (appellants' brief, page 30).

An Idaho statute provided that any person who slaughters cattle must retain in his possession the hide of such cattle with the ears attached thereto for a period of thirty days, and that proof of the failure of any person to do so should be *prima facie* evidence of the commission of the crime of grand larceny as to the cattle slaughtered.

The court in holding this statute invalid stated that

> "where, however, there is no connection or rational relationship between the fact proved and the ultimate fact to be presumed, such a statute shifts the burden of proof, and in a criminal case deprives the defendant of the protection of his constitutional guaranty."

This case has nothing to do with the question of facts being within the knowledge of the defendant and of the reasonableness of the requirement that he be compelled to produce such facts to rebut a presumption created by statute.

Hall vs. *Johnson,* 87 Ore. 21; 169 Pac. 515 (appellants' brief, page 32).

In this case an ordinance of the city of Portland, Oregon, defined what was to be deemed to constitute

a conspiracy to endanger the trade, business or commerce of any person doing business in the city of Portland. It declared such a conspiracy a crime and fixed the punishment therefor. It went on to enumerate certain facts, the performance of any one of which was to be *prima facie* evidence of such a conspiracy. In effect the ordinance made it unlawful for workmen to strike, to solicit others to strike, or to solicit others from accepting employment by any person doing business in the city of Portland.

By section 3 of the act, picketing was made *prima facie* evidence of the offense. The court held the statute invalid, among other reasons because the facts declared to be *prima facie* evidence did not have any direct and logical tendency to prove the antecedent fact. This has nothing to do with the rule of convenience, the application of which we are urging in this case.

Ex parte Smith, 218 Pac. 708 (appellants' brief, page 32).

In this case the court considered a prohibition statute of Oklahoma, which provided that any mash found in any house or building should *prima facie* be deemed to have been made or fermented by and to be the property of the person in actual possession or control of the house or building. The court held the presumption to be unconstitutional.

The court said "it could hardly be said that there was a presumption of law that the person in posses-

sion of the ranch placed it there. All the authorities agreed that such a statutory rule of evidence is a dangerous one, and that it should not be applied where it has no intrinsic evidential force, or where its application will impair some positive statutory or constitutional right."

The court in this case was not considering a state of facts where the knowledge of certain facts was in possession of the defendant and impossible of proof by the State, and where therefore the rule of convenience should be applied.

Simpkins vs. *State,* 249 Pac. 168 (appellants' brief, page 32).

In this case a statute of the State of Alabama made it an offense to drive an automobile while intoxicated. The statute provided that if a person driving the automobile had on or about his person any intoxicating liquor, that fact should constitute *prima facie* evidence of such person having driven while intoxicated.

The court held the presumption to be void. It held that the presumption of intoxication arising from the possession by the person or the presence in the vehicle of liquor was not a "natural hypothesis or explanation of such possession. The inference between the fact of possession and the presumption of intoxication is too remote."

This case in no way involves the question of the reasonableness of a rule of convenience.

People vs. *Cuff,* 122 Cal. 589 (appellants' brief, page 38).

In this case on the trial of a defendant charged with an attempt to kill a person by the administration of poison, consisting of strichnia, the court held inadmissible the evidence which was circumstantial evidence of collateral facts tending to connect the defendant with other events and offenses of a different character and in relation to other persons occurring some time previous to the offense charged, which did not in any appreciable degree tend to show a motive for the attempted murder.

This has not even a remote connection with the rule of convenience, the application of which we are insisting upon in this case.

State vs. *Beswick,* 13 R. I. 211; 43 Am. Rep. 26 (appellants' brief, page 41). (This American Report volume is incorrectly referred to in brief of appellants as Volume 36, at page 102.)

In this case a statute provided that on a criminal prosecution for illegally keeping intoxicating liquors for sale it shall not be necessary to prove the actual sale, and that the notorious character of the premises, or the notoriously bad or intemperate character of those frequenting them, or the keeping of implements or appurtenances usually pertaining to grog shops and the like places, shall be *prima facie* evidence of such illegal keeping. The Rhode Island court held this statute to be unconstitutional.

Assuming this rule to be a valid rule, it has nothing to do with our argument that the rule of convenience is applicable under the facts of our case.

State vs. *Wilson,* 1 Atl. 415; 15 R. I. 180 (appellants' brief, page 42).

In this case the defendant was indicted under a Rhode Island statute for nuisance in keeping a grog shop. A section of the act provided that it shall not be necessary to prove an actual sale of intoxicating liquors in any building, place or tenement in order to establish the "character" of such premises as a common nuisance, but the notorious "character" of any such premises shall be evidence that such premises are nuisances. It was held by the court that testimony of witnesses as to the "reputation" of the defendant's premises might be considered under the statute as testimony with reference to the "character" of the premises, the words "character" and "reputation" being synonymous. The court does refer approvingly to the rule in *State* vs. *Beswick, supra.* All of this has nothing to do with our argument as to the rule of convenience.

People vs. *Toynbee,* 20 Barb. 168 (appellants' brief, page 42).

In this case there was considered a New York statute providing for the prevention of intemperance, pauperism and crime. The statute declared that intoxicating liquors shall not be sold or kept

for sale, etc., except by the persons and for the special uses mentioned in the act. Section 17 of the act declared that upon the trial of any complaint under the act, proof of delivery shall be proof of sale, and proof of sale shall be sufficient to sustain an averment of unlawful sale. The court declared this provision to be unconstitutional.

This has no particular bearing upon our question as to the applicability of the rule of convenience under the facts of our case.

Wynehamer vs. *People,* 13 New York, 387 (appellants' brief, page 42).

In this case we have a New York statute for the prevention of intemperance, pauperism and crime. The act was held unconstitutional because it did not discriminate between such liquors as were possessed by the defendant when the act took effect as a law, and such as might thereafter be acquired by importation or manufacture.

This has not even a remote bearing on the question now before this court.

People vs. *Lyon,* 26 Hun. 180 (appellants' brief, page 43).

In this case there was a New York statute authorizing the issuing of licenses for the sale of spirituous liquors or wines in quantities less than five gallons, but not to be consumed upon the premises. There was a provision in this act that "whenever any person is seen to drink in such shop or house, out-

house, yard or garden belonging thereto any spirituous liquors or wines, forbidden to be drank therein, it shall be *prima facie* evidence that such spirituous liquor or wines were sold by the occupant of such premises, or his agent, with the intent that the same should be drank therein." It was held that as the unlawful act of a third person with which the accused was not necessarily connected was thereby made *prima facie* evidence of his having committed a criminal offense, the law was unconstitutional, as it deprived the accused of his right to a trial by jury.

There would seem to be sound reasoning for the conclusion of the court, but this has nothing to do with the rule of convenience.

People vs. *Cannon,* 139 N. Y. 32; 34 N. E. 759 (appellants' brief, page 43).

In this case a New York statute made it a misdemeanor for anyone to fill up with soda water, etc., registered stamped bottles of manufacturers of soda water, etc., or to deface the stamp thereon, or to sell, buy, etc., the same without the written consent of, or unless the same shall have been purchased from the person whose stamp is thereon. There was a provision in the statute that the possession by a dealer in secondhand articles of any registered, stamped bottles, without the written consent of the owner of the stamp, would be presumptive evidence of unlawful use, purchasing and

traffic therein. The court held this to be a proper legislative enactment, there being such connection between the possession and an unlawful traffic therein as to make it proper presumptive evidence of guilt.

The court went on to describe limitations which must be kept in mind in enacting such statutory presumptions. That is, "the limitations are that the fact upon which the presumption is to rest must have some fair relation to or natural connection with the main fact."

There is nothing in this case at all involving the question of the right to adopt the rule of convenience.

Hammond vs. *State,* 84 N. E. 416 (appellants' brief, page 43).

This case held that in an anti-trust law of the State of Ohio, a section thereof providing that "the character of the trust or combination alleged may be established by proof of its general reputation as such" is unconstitutional and void in that it prescribes a rule of evidence which is violative of the constitutional guarantee contained in the Fourteenth Amendment to the United States Constitution.

It was not possible in this case for the court to consider the rule of convenience.

State vs. *Momberg,* 103 N. W. 566 (appellants' brief, page 43).

In this case there was a North Dakota statute which made the fact that one has or keeps posted in or about his place of business a United States revenue receipt or license for the sale of distilled malt or fermented liquor *prima facie* evidence that he is selling and keeping for sale intoxicating liquor contrary to law.

It was held that this *prima facie* presumption was not conclusive and for the court to so instruct was error.

This has no bearing upon our argument with reference to the pertinency of the rule of convenience under the facts of our case.

State vs. *Potello,* 119 Pac. 1023 (appellants' brief, page 43).

In this case, decided by the Supreme Court of Utah, there was a statute providing that the possession of property recently stolen when the possessor fails to make satisfactory explanation shall be deemed *prima facie* evidence of his guilt. It was held that this provision of the statute was not invalid as encroaching upon the judiciary on the theory that mere proof of the larceny and of accused's recent possession requires a conviction.

The court construed the statute as creating nothing more than a *prima facie* presumption which meant "presumptive" evidence, the term not meaning that unless refuted by other evidence or discredited by circumstances the proof becomes

conclusive as to guilt. The only evidence introduced in that trial concerning the larceny was afforded by the defendant's evidence and that showed that the larceny was committed by another.

There was no possibility for the court to consider the logic of our rule of convenience.

Bailey vs. *State of Alabama,* 219 U. S. 219 (appellants' brief, page 48).

In this case an Alabama statute was before the United States Supreme Court. The statute declared that a presumption of fraud should arise from a mere breach of contract.

Here, again, there is no question of the propriety of the rule of convenience. There could have been no discussion or consideration by the court of the soundness of the rule made necessary by the circumstance of a fact, essential to be proved, being peculiarly within the knowledge of the defendant and readily provable by him.

For some of the reasons above indicated we made our motion to dismiss, which motion this court has taken under advisement, to be finally determined at the hearing on the merits. That is, we urged in said motion that the appellants have not presented a substantial Federal question which is open for decision at the present time.

We further urged that the question upon which it is claimed the jurisdiction of the United States

Supreme Court depends is so frivolous as to not need further argument.

Further, we moved for dismissal because the questions on which the decision of the cause depends are so unsubstantial as to not need further argument.

In conclusion, the State of California has successfully sustained the constitutionality and validity of its Alien Land Act in many cases over a period of several years, decided by State and Federal courts and by the United States Supreme Court. If now the validify of our 1927 legislation is not sustained, the successful prosecution of earlier cases will be practically of no avail, for the reason that the law which has been sustained by these various courts, including the United States Supreme Court, will not be enforceable.

Counsel for appellants suggests in his brief, at pages 50 and 51, that we have sufficient means of enforcement of Alien Land Act legislation by reason of section 9b of the Alien Land Act, which has been finally sustained by the courts. This section permits additional proof by the State of the race of the defendant. That is, proof of race inelligible to citizenship. The two sections, 9a and 9b, were adopted by the same statute at the 1927 session of the Legislature.

An experience of many years in confronting manifest difficulties of proof convinced the Attorney General's office and the various district attorneys of

the State, that the State was entitled to both of these sections in the Alien Land Act. Section 9b rendered possible proof in certain cases which theretofore had not been provable.

However, there still remain a multitude of cases that are not helped by section 9b. In many cases we may have a Mexican or a Chinaman or a Japanese with no records of birth available, with no facilities for visiting the country of their assumed nativity, and with no witnesess to testify as to the birth or as to the parentage of these persons. We know that on the Pacific coast many such persons have been smuggled into the United States contrary to law, and proof of their nativity or race is impossible.

If our reasoning in this case is logical, we are just as much entitled to section 9a as we are to section 9b of the Alien Land Act. If the final decision of the Supreme Court of the State of California sustaining section 9b and the refusal of the United States Supreme Court to entertain jurisdiction of an appeal from another decision involving the same section 9b be correct, then we submit that the ruling of the State Supreme Court sustaining section 9a in the present case should be sustained by the United States Supreme Court. The ruling referred to by the United States Supreme Court refusing to entertain jurisdiction was in the case of *George Morrison and H. K. Ozaki, Appellants,* vs. *The People of the State of Cali-*

fornia, 288 U. S. 591; 53 Sup. Ct. Rep. 401.

It is respectfully submitted that the judgment of the Supreme Court of the State of California should be affirmed.

Respectfully submitted.

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